No. 2264

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

For the Ninth Circuit

CONTINENTAL AND COMMERCIAL TRUST & SAVINGS BANK, a Corporation, and **FRANK H. JONES**, Trustees, Appellants,

vs.

COREY BROS. CONSTRUCTION COMPANY, a Corporation, and **UNION PORTLAND CEMENT COMPANY**, a Corporation, Appellees.

Upon Appeal from the United States District Court for the District of Idaho, Southern Division

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BRIEF FOR APPELLEES, COREY BROS. CONSTRUCTION COMPANY, A CORPORATION, AND UNION PORTLAND CEMENT COMPANY, A CORPORATION.

H. H. HENDERSON,
Attorney for Appellees.

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STATEMENT OF THE CASE.

On May 27, 1909, one George S. Speer entered into a contract with the State Land Board of Idaho to build a dam and construct an irrigation system on the Big Lost River in the State of Idaho, pursuant to the provisions of Section 4 of an act of congress approved August 18, 1894 (28 Stat. 422), as amended by

act of June 11, 1896 (29 Stat. 413, 434), and Section 3 of the act of March 3, 1901 (31 Stat. 1188), and of Section 1613 to 1634, inclusive, of the Idaho Revised Codes. This undertaking is popularly known as a "Carey Act project," and provided for the irrigation of about 100,000 acres of arid land in the Counties of Blaine, Bingham, Custer and Fremont, of Idaho.

On June 15, 1909, the defendant, Big Lost River Irrigation Company, was organized under the laws of the state of Idaho with $1,000,000 capitalization to take over this contract of Speer's and construct the irrigation system. On or about the 21st day of July, 1909, with the consent of the State Land Board of Idaho, this company acquired all the rights of George S. Speer and agreed to build this system of irrigation. The promoters and organizers of this corporation were C. B. Hurtt, James E. Clinton, Jr., N. M. Ruick, George S. Speer and others. When the corporation was first organized the incorporators subscribed for one share of stock each, being $700.00 out of the one million capitalization. Speer was not one of the original incorporators, but was the actual promoter of the corporation, and became the owner within a few weeks after the organization of $999,300 of the capital stock. Speer at this time was also vice president of the corporation known as Trowbridge & Niver, a bond house of Chicago, and which became the fiscal agent of the Big Lost River Irrigation Company.

Afterwards, on August 26th, 1909, the Big Lost River Irrigation Company entered into a written contract with the Corey Bros. Construction Company, a Utah corporation, to do all the work of building the dam and canals at certain mutual agreed prices. All the work was to be done under the immediate supervision of the engineers of the Big Lost River Irrigation Company.

The Arnold Company, a corporation of Chicago, had the contract with the Big Lost River Irrigation Company for drawing all plans and supervising all the engineering work of this project.

Prior to August 26, 1909, to-wit, on or about June 15, 1909, Corey Bros. Construction Company, pursuant to a talk and verbal understanding with the organizers and promoters of the Big Lost River Irrigation Company, commenced to construct this irrigation system. Prior to Corey Bros. Construction Company commencing work, the promoters of the Big Lost River Irrigation Company furnished to Corey Bros. a form of contract which was afterwards signed by the Big Lost River Irrigation Company (without any changes, except inserting the date) on August 26, 1909.

This contract provided that 90% of the cost of the materials furnished and work done should be paid to Corey Bros. Construction Company by the Big Lost River Irrigation Company on or before the 10th

day of each calendar month for all work done during the preceding calendar month, and that said payments should be made on the estimates of the engineer of the Big Lost River Irrigation Company of the amount of work done and material furnished.

In compliance with this contract furnished to Corey Bros. Construction Company by the promoters of the Big Lost River Irrigation Company, monthly estimates were furnished to Corey Bros. Construction Company by the Arnold Company, commencing on the 1st day of July, 1909.

It may be well to state here that all the payments of money made to Corey Bros. Construction Company, except one payment that was made by the Big Lost River Irrigation Company, were made by Trowbridge & Niver, and were credited by Corey Bros. Construction Company to the account of the Big Lost River Irrigation Company.

On August 15, 1910, the Big Lost River Irrigation Company, having failed to comply with its agreement to make the payments for work done, Corey Bros. Construction Company stopped work upon this system, and refused to do any more work until the Big Lost River Irrigation Company should comply with its contract making the payments as agreed upon. At this time the Big Lost River Irrigation Company was insolvent, and Corey Bros. Construction Company being unable to get any further pay-

ments from the Big Lost River Irrigation Company, within the time provided by statute, filed a mechanic's lien upon all the land, canals and dam and water rights belonging or connected with the system of the Big Lost River Irrigation Company in the Counties of Blaine, Bingham, Custer and Fremont.

At this time there was due to Corey Bros. Construction Company about the sum of $525,000.

On the 27th day of August, 1909, the Big Lost River Irrigation Company executed and acknowledged a deed of trust to the American Trust and Savings Bank (now the Continental and Commercial Trust and Savings Bank) and Frank H. Jones, as Trustees, to secure two million worth of bonds, which bonds were dated July 1, 1909, upon the irrigation system being constructed by Corey Bros. Construction Company for the Big Lost River Irrigation Company, which deed was, on the 3rd day of September, 1909, filed for record in the counties of Bingham and Blaine and later was filed for record in the counties of Fremont and Custer. On January 1, 1910, the Big Lost River Irrigation Company made and executed another trust deed to the said Trustees to secure $400,000 worth of bonds, which trust deed was thereafter filed for record in the above named counties.

On October 15, 1910, Corey Bros. Construction

Company filed a bill in equity in the United States Circuit court for the District of Idaho to foreclose its mechanics lien, and made as parties defendant the Big Lost River Irrigation Company, The American Trust and Savings Bank (now The Continental and Commercial Trust and Savings Bank) a corporation, and Frank H. Jones as Trustees.

Corey Bros. Construction Company being a corporation organized and existing under and by virtue of the laws of the state of Utah, and a resident and citizen of said state.

The Big Lost River Irrigation Company being a corporation organized and existing under and by virtue of the laws of the state of Idaho, and a resident and citizen of the state of Idaho.

The American Trust and Savings Bank (now The Continental Trust and Savings Bank) being a corporation organized and existing under and by virtue of the laws of the state of Illinois, and a resident and citizen of Illinois.

Frank H. Jones being also a resident and citizen of the state of Illinois.

Afterwards, and before these defendants had plead, Corey Bros. Construction Company filed an amended bill in said action making these same parties defendants, and also made the Union Portland Cement Company, a corporation, organized and existing under and by virtue of the laws of the state of

Utah, and a resident and citizen of the state of Utah, J. M. Bate and Joseph Bate, copartners under the firm name and style of Bate & Bate; Nephi Straw, A. W. Cherrington and Jas. Miller, co-partners under the firm name and style of Straw, Cherrington & Miller; F. C. Gammell and James Straw, Jr., co-partners under the firm name and style of Gammell & Straw, and A. C. Bird, residents and citizens of the State of Utah; Goyne Drummond, a resident and citizen of the state of Wyoming; Nephi Hansen and Ephraim Hansen, co-partners under the firm name and style of Hansen Bros., K. L. Molen and R. E. Kutler, co-partners under the firm name and style of Molen & Kutler; J. W. Curd and N. Foss, co-partners under the firm name and style of Curd & Foss; K. L. Molen and Jesse Molen, co-partners under the firm name and style of Molen & Molen; David Chamberlain and Thomas Chamberlain, co-partners under the firm name and style of Chamberlain Bros.; Frank Hess, S. H. Walton, F. L. Pinney and William Mooney, residents and citizens of the State of Idaho, parties defendants.

Thereafter, on the 21st day of January, 1911, before any plea or answer had been made by any of the defendants, on motion of counsel for Corey Bros. Construction Company, an order was entered dismissing said amended bill as to all of the defendants who were residents of the State of Utah, and also as to

Goyne Drummond, who was a resident of the State of Wyoming.

On the 29th day of May, 1911, on application of the attorney for Corey Bros. Construction Company, the United States District Judge appointed a receiver of all the property and effects of the Big Lost River Irrigation Company. Said receiver was appointed on consent of the attorney of the Big Lost River Irrigation Company and The Continental and Commercial Trust and Savings Bank, successor of the American Trust and Savings Bank, Trustee, and Frank H. Jones, trustee, and said receiver is now in possession of all the property of the Big Lost River Irrigation Company.

On the 18th day of September, 1909, the Big Lost River Irrigation Company signed a written contract with the intervenor, Union Portland Cement Company, according to the terms of which the Union Portland Cement Company agreed to furnish all the cement for the Big Lost River Irrigation Company at the rate of $2.84 per barrel delivered at Mackay and Moore in the state of Idaho. This writen contract was signed persuant to a verbal contract made with the agent of the Big Lost River Irrigation Company some time before the 18th day of September, 1909. The first cement under this contract was delivered to the Big Lost River Irrigation Company

on the 2nd day of September, 1909, and the last cement on the 25th day of June, 1910.

That on the 20th day of August, 1910, within the time provided by statute, the Union Portland Cement Company filed its mechanic's lien in the Counties of Blaine, Bingham, Fremont and Custer, State of Idaho, and thereafter, on October 22, 1910, the Union Portland Cement Company filed its bill in equity in the United States Circuit Court in and for the District of Idaho, sitting at Boise, to foreclose its mechanic's lien, making as parties defendants the Big Lost River Irrigation Company, The American Trust and Savings Bank (now The Continental and Commercial Trust and Savings Bank) and Frank H. Jones.

Afterwards, on the 4th day of January, 1912, the Union Portland Cement Company filed its complaint in intervention in the case wherein Corey Bros. Construction Company had commenced its suit to foreclose its mechanics lien against the Big Lost River Irrigation Company et al as defendants, this being the suit in which a receiver had heretofore been appointed of all property of the Big Lost River Irrigation Company.

Answers were filed by the defendants in the Corey case where the receiver was appointed and the issues were made up, and the testimony was taken before a Master, and on the 27th day of December,

1912, the judge of the District Court of Idaho signed a final decree in behalf of Corey Bros. Construction Company for the sum of $609,444.03, and also $16,000 attorney's fees, and in behalf of the Union Portland Cement Company, intervenor, in the sum of16,054.40, and also $1,000.00 attorney's fees, and $500.00 costs against the defendant, Big Lost River Irrigation Company, and decreed said sums of money to be a first lien upon all the irrigation system, consisting of canals, dams, reservoirs and water rights belonging to the Big Lost River Irrigation Company, and ordered said property to be sold without equity of redemption to satisfy said sums of money, and said court also decreed that the trust deeds of the defendants, Continental and Commercial Trust and Savings Bank (formerly The American Trust and Savings Bank) and Frank H. Jones, and that the liens of the other defendants were subsequent and inferior to the plaintiff, Corey Bros. Construction Company and the Intervenor, Union Portland Cement Company mechanic's lien.

ARGUMENT

Did Corey Bros. Construction Company Perform its part of the contract made and entered into between it and the Big Lost River Irrigation Company for the building of the Big Lost River Irrigation Project?

It is the contention of the appellants' trustees that Corey Bros. Construction Company so far departed from the terms and specifications of the contract entered into between it and the Big Lost River Irrigation Company that all the work done by Corey Bros. Construction Company is practically worthless, and that the Big Lost River Irrigation Company, by the failure of the said Corey Bros. Construction Company to properly do its work, has been damaged far in excess of any amount claimed by Corey Bros. Construction Company, and therefore Corey Bros. Construction Company is not entitled to any lien upon said project in any amount. This issue was raised entirely by appellants in the amendments made to their answer which were filed in the lower court on the first day, April 5th, 1912, that testimony was taken before the examiner in the court below, (Rec. 65 to 69. Also record 154). This issue was not raised by the defendant, Big Lost River Irrigation Company, unless it can be said

that the denial in paragraph 9 of its answer, found on page 46 of the record, makes such an issue.

It appears in the record that N. M. Ruick was the attorney for both the Big Lost River Irrigation Company and for appellants' trustees, and from the similarity of the denials in both answers, it must be presumed that he was fully acquainted with all the facts in the case.

It is the contention of Corey Bros. Construction Company that it performed all the work upon this project under the immediate and direct supervision of the engineers of the Big Lost River Irrigation Company, which engineers were the agents and the superintendents of the Big Lost River Irrigation Company.

Before entering upon a detailed discussion of the evidence of the various witnesses, it may be well to call the court's attention to some of the terms of the contract made between Corey Bros. Construction Company and the Big Lost River Irrigation Company, and also to some of the terms of the contract made and entertd into between the Big Lost River Irrigation Company and the Arnold Company of Chicago, which had the contract for doing all the engineering work.

In the contract made between Corey Bros. Construction Company and the Big Lost River Irriga-

tion Company under the head of "Definition of Terms," we find the following:

> "The term Engineer is used to designate the Consulting Engineer duly appointed and assigned by the Company to have general charge of all work incidental to the construction of the Company's project ready for operation." (Rec. 484).

Under the head of "Inspection," paragraph 5, we find the following:

> "The Supervising Engineer, or his duly authorized assistants shall at all times have access to the work, **which work is to be entirely under their control.**
>
> "Any material or construction which does not fully accord with the letter or the intent of these specifications may be condemned by the Engineer or his representatives, and the Contractor shall immediately rectify or replace such defective work without expense to the company." (Rec. 486, 489).

Under the head of "Specification for the construction of earth dam and controlling works," under paragraph 3 (Rec. 497) we find the following:

> "All material that has been rejected by the Engineer on the work is to be removed at once from the site of the work. Any work that has been done, and has been found to be defective, shall at the direction of the Engineer be taken out and replaced to the satisfaction of the Engineer."

Under paragraph 5 of this contract (Rec. 502), we find the following:

> "Monthly estimates shall be made by the Engineer of the work completed and material on hand but not yet in place, and the company will, on or before the tenth day of each calendar month, make payment to the contractor of 90 per cent of these estimates, based on the unit contract prices for all work completed, and the actual cost of material on hand, but not in place."

Throughout the whole of this contract the word "engineer" appears a great many times, and it is certain beyond preadventure of doubt that according to the terms and specifications of this contract that Corey Bros. Construction Company was to be guided entirely by the engineers of the Big Lost River Irrigation Company in the doing of this work.

Reverting now to the contract made between the Big Lost River Irrigation Company and The Arnold Company, we find the following provisions under article 1:

> "(1). This contract is intended to include all the engineering work of whatsoever nature necessary to complete the irrigation system of the Big Lost River Irrigation Company, located in Blaine County, Idaho, ready for operation as a completed irrigation system." (Rec. 538).

Under Article 2, subdivision 1, we find:

> "The Engineer agrees to make all surveys, plans, estimates, and specifications which are necessary preliminary to the letting of contracts for the construction of the structures and canals for the entire project."
>
> "(3). To furnish the Client with a report covering the possible methods of developing the project with recommendations as to the best sequence for carrying on the construction of the various parts of the work."
>
> "(4). To supervise the construction of the irrigation project herein specified, **and to interpret the plans and specifications, and for this purpose shall furnish a competent supervising engineer, who shall represent the Engineer** on the construction work, and such a field force is as necessary to stake out the work and measure the same for payment."
>
> "(5). To supervise and inspect all materials entering into the work, and shall if requested in writing, furnish and submit to the Client all necessary records in connection with such inspection." (Rec. 539).

Under Article 3, subdivision 2 of said contract we find the following:

> "The Client further agrees to pay the Engineer for **supervision of construction,** as heretofore described, an additional two per cent (2%) based on the final contract figures." (Rec. 540).

Under Article 4, we find also the following:

> "The force account work contemplated under this contract consists of the supervising of soundings or borings for foundations, the employment of necessary inspectors to actually supervise the placing of material in the structures, or engineering field work of any nature whatsoever that the Client may require done under the direction of the Engineer, or which the Engineer shall consider necessary to properly prosecute the work." (Rec. 541).

Taking these two contracts together it will seem that Corey Bros. Construction Company were to be guided entirely in the performance of their work by the engineers of the Big Lost River Irrigation Company. The Arnold Company, which was the Engineer, being a corporation could only act through its officers and duly authorized agents.

W. H. Rosecrans was styled chief engineer, and had his office in Chicago.

The engineers in charge in this field and who would properly be styled supervising engineers under the foregoing contract of this work first were Raschbacher and then Drummond. W. W. Corey testified, which testimony is uncontradicted, that Hurtt, the President of the Big Lost River Irrigation Company told him that his company would receive orders from Raschbacher and afterwards from Drummond. (Rec. 163). W. W. Corey further testi-

fied that his company did the work according to the plans and specifications in the contract and under the directions of the engineers in charge of the work. (Rec. 194).

Orson O. Corey testified to the same fact. (Rec. 218).

This testimony was also corroborated by Goyne Drummond, the engineer in charge of said work for and on behalf of the Big Lost River Irrigation Company. In substance Mr. Drummond testified as follows:

"Raschbacher gave Corey Brothers directions while I was there. He was the engineer in charge prior to the time I took charge. I gave Corey Bros. instructions as to where I wanted the work done, canals, laterals and dams. I was acquainted with the contract between Corey Brothers and Big Lost River Irrigation Company. I gave them all the instructions that were necessary to do the work, how I wanted certain materials placed in the canals, and what work on the canals and laterals I wanted first completed. Corey Bros. Construction Company followed the terms of this contract with the Big Lost River Irrigation Company in doing that work." (Rec. 156).

Frank A. Coy, an engineer in charge of the dam, a witness in behalf of appellants' trustees, also testified that Corey Bros. Construction Company did its

work in accordance with the contract. (Rec. 392).

At this time it may be well to discuss the testimony offered by the appellants' trustees in support of the affirmative matter set out in their answer, keeping in mind that the Big Lost River Irrigation Company though it was represented at the trial by counsel, did not introduce any evidence whatever.

One Mr. Samuel Storrow was an expert witness on behalf of appellants' trustees. In discussing Mr. Storrow's testimony it would be well to keep in mind that the dam was about one half completed.

In the latter part of June and the first part of July, 1911, Mr. Storrow, in accordance with instructions from Harrison B. Riley, Chairman, and other members of the Bondholders' Committee, proceeded to make an examination of the Mackey dam and irrigation system of the Big Lost River project.

Mr. Storrow in his direct examination and in speaking of the dam said that he found a very heavy leakage through the dam, and some leakage through the core wall. That the bottoms of all the dumps throughout the dam everywhere were composed of coarse material which had rolled down the slope from the dumping cars; in all places where the core-wall was exposed the material next to it was coarse, full of boulders, either not puddled or puddled so slightly as to leave crevices, those near the core-wall not more than half closed and sometimes not closed

at all. That he found that the cutting away in the borrow pits had been carried so close to the body of the dam **as to present an opportunity for the face of the dam to slide down into the borrow pit.** That the material excavated from both tunnel and parts of the spillway had been thrown down onto the dam as it was being built. That he made an examination of some parts of the core-wall in plain sight and found no evidence of bonding, except that when they got through building, one piece of concrete by and by they came back and built another. That the effect of this method of construction would cause the core-wall to leak. That the toe of the dam according to his recollection was not distant more than ten feet from the borrow pits. That he examined the gravel pits and found the gravel rather coarse, but containing a considerable amount of finer gravel until the finest became almost impalpable powder. (Rec. 251). That the object, purpose and effect of puddling is to get fine material from one part of the work and add that fine material to the fill of another part, for the purpose of rendering more water tight and impervious that place to which the fines are added by the process of puddling. **That he found 1,500 or 1,800 cubic yards of material dumped from a trestle crossing the core-wall,** and that he found other evidence that material

had been dumped from trestles at different angles to the core-wall.

That if material is dumped from a trestle crossing the core-wall at an angle of 90 or 45 degrees an impervious bank against the core-wall could not be obtained by any amount of puddling. By puddling fine material is moved horizontally. That a dam so constructed, completed to a height of 120 feet would not in my opinion sustain a height of water of 100 feet. That the borrow-pits were in the cone at Cedar Creek. **With a core-wall extending only 6 or 8 feet below the original surface in the cone, and the back filled trench to the same depth, there would, in my opinion, be a very serious leakage under the fill that would unquestionably affect the amount of water in the reservoir and cause the wreck of the dam.**

Where the dam is designed with a core-wall in the middle, with puddled material beside it, the office of a core-wall and puddled portion is to connect the body of the dam with the substantially impervious material below, thereby forming the impervious portion of the fill; the balance of the fill is for weight and strength to resist the thrust. (Rec. 254 and 255.)

To remove the central portion of the dam and replace the material by a puddling process in accordance with the specifications **is not practicable;**

the expense would be too great. That he made estimates as to what it would cost to take this dam on this site and make a satisfactory dam of it, varying from the specifications so as to hold a 100-feet head of water, and it would cost $600,000. (Rec. 256).

The foregoing are some of the principal objections that Mr. Storrow had to find with the Mackay dam in its construction. Let us examine these objections in the light of other evidence that was offered on this subject and see whether the contractor did not perform his duty as outlined by the contract.

Mr. Storrow defines puddling as removing by water the finer materials from a bank of dirt or gravel and deposisting this finer material in another place removed from said bank of dirt or gravel. Theoretically in some instances this definition may be correct, but what does the contract say? Under subdivision eight of the specifications for the construction of the dam we find the following:

> "The method of puddling this material shall be as follows: It is the intention to thoroughly wet the interior portion of the dam throughout a section of embankment, which extend for a distance of 30 feet each side of the core-wall at the base of the dam at the maximum height, with a width of 6 feet of wetted section on the crest of the dam, the limits being defined for various eleva-

tions of dams by straight lines drawn between these points. Such labor must be performed and plant furnished to carry out this wetting continuously during the forming of embankment as is **satisfactory to the Engineer.** The cost of this wetting, plus 10 per cent, will be paid as hereinafter specified.

"In general, it is expected that **all** of the material developed in the borrow pits is suitable material but the Contractor will be required to leave any large amount of undesirable material in the pits, and will be required within pratical limits to so conduct the lacing of the material in the embankment as to mix the various materials which may be encountered. No frosty material will be allowed placed in the embankment, and the Contractor will be required to so saturate the wetted portion of the dam as to entirely dissolve any lumpy material." (Rec. 514).

Previous to the drawing of this contract it would appear that the material in the borrow pits had been examined by the engineers, and that material was considered suitable material to be dumped upon this portion of the dam that was to be thoroughly wetted, and after this material was dumped according to the express terms of this contract, it was to be wetted to the satisfaction of the engineer in charge of the work. Counsel for appellants' trustees try to evade this express provision of the contract by referring

to other portions of the contract, stating that the material deposited next to the core-wall should be impervious material, and impervious material could not be placed there without sluicing it in the manner described by Mr. Storrow. This was a question to be decided by the engineer of the Big Lost River Irrigation Company, and if we followed his instructions, we performed our duty. The evidence is uncontradicted in this regard that we did follow his instructions.

Mr. Green, one of the engineers called by the appellants' trustees, stated that this fine material should have been sluiced in there or else the fine material should have been screenned and carried there by cars and deposited and thoroughly wetted. (Rec. 405).

Mr. Raschbacher, the resident engineer of the Big Lost River Irrigation Company, approved of the method of Corey Bros. Construction Company for wetting it, and afterwards in the month of September, 1909, ordered another pump placed upon the work, which was done. Plaintiffs' Ex. 84. (Rec. 428).

The evidence further shows that Mr. Rosecrans, the chief engineer of the Big Lost River Irrigation project, was there at least once or twice during the summer and fall of 1909, and he must have seen the manner of dumping this gravel, and by his silence,

found no fault with it, and the fact that Mr. Rosecrans as chief engineer approved of the monthly estimates for this work done by Corey Bros. Construction Company shows that he affirmatively approved of the manner and method of the fill and the manner of wetting the gravel.

Storrow finds fault with the execution of the plans and specifications, for the reason that a tunnel was built for the spillway instead of an open cut, and a part of the rock from this spillway tunnel was dumped into the dam below and near the corewall. This tunnnel was built under the immediate direction of the engineer in charge.

On June 7, 1909, Mr. Raschbacher, the engineer in charge, wrote the following letter to Corey Bros. Construction Company.

Mackay, Idaho, 6, 7, 09.

Corey Brothers Construction Company,
Mackay, Idaho.

Gentlemen: Conditions being such that same can be carried out by contractors without additional expense or any delay in work, authority being given engineer to determine same, you are hereby notified that all spoil from tunnel approaches, tunnel bore and spillway excavation, **must be deposited within slope stakes of Mackay reservoir dam.**

Sincerely yours,
H. B. Raschbacher,
"Engr. The Arnold Company."

Rec. 186).

Counsel for defendants trustees severely castigate the contractor for permitting part of this spoil to be deposited within twenty feet of the core-wall.

The evidence is uncontradicted that Mr. Rosecrans, the chief engineer, was there several times during the summer and fall of 1909, and saw this tunnel and saw where this spoil was being deposited, and by his silence approved of it, and Mr. Rosecrans affirmatively approved of the building of this tunnel by signing the monthly estimates that were delivered to Corey Bros Construction Company. Exs. 38 to 41. (Rec. 200).

The monthly estimates delivered to the contractor, signed by Rosecrans, particularly designated the rock work taken out of this spillway tunel. All of these estimate sheets gave in detail all the work done, so that Mr. Rosecrans could keep himself informed of the kind, nature and the progress of the work. Plaintiffs' Ex. 19. (Rec 428).

Again fault is found by Storrow that in the places that he made his examination that the core-wall was not built upon solid rock or impervious material. If this were so, I think this is the most serious objection that could be made.

Let us examine the record. Frank A. Coy, a witness called by appellants' Trustees, and one of the engineers of the Big Lost River Irrigation Company, laid out the trench for this core-wall and set

the stakes for its depth. The blue prints show that the core-wall should be set into the ground six feet. Defendants' Trustees Ex. No. 1. The printed contract indicates that the core-wall should be put down to impervious material. This being so, who was to determine what was impervious material, if not the engineer? Coy did not quit the work until the latter part of November, 1909, long after the tunnel had been constructed, and long after the spoil from the tunnel had been dumped in the body of the dam, and long after the foundation of the core-wall had been laid.

Coy, in his testimony, under oath, states that during all the time that he was there Corey Bros. Construction Company lived up to the terms and conditions and specifications of the contract. (Rec. 392).

The plans and specifications for the facing of the dam up stream called for riprap. According to the undisputed testimony, the chief engineer, Rosecrans, ordered the face of the dam to be of concrete. Will the gentlemen for the trustees say that this change was not for a betterment of the enterprise? (Rec. 376 and 377).

Storrow says that the borrow pits were excavated too near the toe of the dam; that the plans called for the borrow pits to be located two hundred feet away from the toe of the dam, and that according

to his best judgment one of the borrow pits was within ten feet of the toe of the dam, and that on account of this borrow pit being so near the toe of the dam that there was danger of the face of the dam slipping off into the borrow pits.

Corey and Henderson testified by actual measurements made from the toe of the dam on June 11, 1912, that the nearest pit was one hundred and seventy five feet distant, and the others were one hundred and ninety feet away. (Rec. 426, 436). They further testified that the borrow pits were not excavated in any place lower than the toe of the dam. If the borrow pits were not excavated at any place lower than the toe of the dam how could this concrete face slip off into the borrow pits?

According to Storrow's own testimony the nearest borrow pit was ten feet away from the toe of the dam. The cement facing was built upon a ground foundation with a slope of two and one-half to one, which is an angle of less than twenty-two degrees. Storrow by his testimony would convey to this court that there was danger to be apprehended by the slipping of this concrete slope into the borrow pits, which is preposterous and unworthy of belief.

Coy staked out these borrow pits and under the terms of the contract that Corey Bros. Construction Company had with the Big Lost River Irrigation Company, the material that was dumped in the dam

was to be measured in the borrow pits. Coy says in his sworn testimony that Corey Bros. Construction Company performed its contract according to the plans and specifications while he was there.

In looking at some of the photographs that have been introduced in evidence, it will be observed that borrow pit number one lays adjacent to the river, and in order to get out of this borrow pit it was necessary for Corey Bros. Construction Company to cut down an embankment eight or ten feet high and to level a space sufficient to lay down two tracks and to provide for the location of a water tank. Storrow, in his desire to do an injustice to the contractor, considers this grade for the track as part of the borrow pit. Corey says that the nearest point of this borrow pit is one hundred and ninety feet from the toe of the dam.

Again Storrow says in his direct examination that the cost of removing material for thirty feet on each side of the core-wall was prohibitive and was impraticable. Let us see whether this statement is justified by the evidence.

According to the plans and specifications this dam was to be about 2,000 feet long and 600 feet wide; a concrete core-wall being in the center. When Corey Bros. Construction Company stopped work upon this system because of the fault and negligence of the Big Lost River Irrigation Company in failing

to make its payments as agreed upon, it had done in round numbers, $1,215,000 worth of work. $932,-000 had been done upon the canal system. $241,000 upon the dam. For earth and embankment in the dam, Corey Bros. Construction Company had been allowed for 479,908 cubic yards at 25c a yard, making a total of $119,977. This yardage spread over an area of ground 2,000 feet long by 600 feet wide, and to remove sixty feet in the center, which could be done with steam shovels, Storrow claims to be prohibitive and impracticable. When Storrow made that statement he knew it to be untrue and he knew it to be false. Taking this statement that the cost would be prohibitive to remove this small yardage in com parison to the whole amount, and taking his statement that there was danger of the cement facing sliding into the borrow pits, all of which were recklessly stated and made, stamps Storrow's testimony as unworthy of belief.

On cross-examination Mr. Storrow testified that he had acted in the same capacity on other works as Mr. Drummond occupied on the Big Lost River Irrigation project, and as supervising engineer he always had the right to make changes in the plans where he thought it was for the benefit of the enterprise, but he is very positive that Mr. Drummond as supervising engineer had no such authority. (Rec. 262).

Storrow further stated that in his opinion the core-wall as constructed was not sufficient, for the reason that it had not been built upon impervious material or solid rock, yet the foundation for this core-wall was laid out by Mr. Coy, whom counsel for defendants trustees says performed all his duties, and that while Coy was there the contractor did work according to the plans and specifications.

The plans and specifications call for a solid concrete core-wall running through this dam in the center for nine hundred feet. This core-wall was designed and intended to cut off all water, and this core-wall did not need the assistance of any impervious material, on either side of it to accomplish that very purpose. Of course, if the core-wall was not built on impervious material, then putting in impervious material above the ground on each side of the core-wall would not accomplish the purpose intended, so that the inevitable conclusion is from Storrow's testimony that the fault lay in not building the core-wall on impervious material, and according to his own testimony, something else would have to be done to cut off this flow of water which would naturally seep under this core-wall.

We would direct the Court's attention to the cross-examination of Mr. Storrow, as found on pages 261 to 266, and also as found on pages 343 to 353, and

to note the evasions to which he resorted in answering direct questions on cross-examination.

On cross-examination we asked him if he had not made a report to Mr. Riley as to how much it would cost to complete this structure, and he said that he had, according to his best memory, it was $675,000. (Rec. 344). He stated that he had his report in court; that he would not look at it, and he was further asked if he had not stated in his report that the cost would be $550,000, and he answered "No sir." (Rec. 344).

On cross-examination he further testified I told Mr. Riley, either verbally or in the report, that the work which it would be necessary to do at the Mackay dam in order to make a serviceable dam of it was divided into two lines, one———

Q—Will you get your report and read from it?

A—No, I decline to.

Q—Are you now testifying from your recollection?

A—I am testifying to what is in the report. (Rec. 345).

* * * * * * * * * * * * * *

Q—What was your estimate on the new dam?

A—I have forgotten the exact figures. The first cost is higher than the cost of repairing the Corey dam, but, as I have just told you, I advised Mr. Riley that the ultimate cost would be less, al-

though the first cost would be a little more, that is, the apparent first cost.

Q—You have that report in court in front of you, will you state what you reported to Mr. Riley the new dam would cost?

A—I do not have that report in front of me.

Q—It is on the table, isn't it?

A—I do not know; I am not looking at the table; I am looking at you.

Q—I will ask you to look at the table.

A—That is not my copy of my report. That belongs to counsel; that is not my copy.

Q—But you know that a copy of your report is here?

A—Yes sir. (Rec. 346 and 347).

Witness refused to look at his report to see whether the sworn statements that he was making from memory were justified by his written report. He refused to let counsel for plaintiff see that report and tried to hide under the excuse that this report was a private communication and therefore privileged. (Rec 348).

We have a right to believe that Storrow when he was on the stand knew that the oral testimony that he was giving concerning his report that he had made to Mr. Riley was false, and that he was afraid either to show that report to counsel for plaintiff or to read that part of the report that re-

lated to the old dam and what his recommendations were concerning the rebuilding of it. Hiding under the shield of a pretended private communication in this case at that time, we do not believe will aid the truthfulness of this witness, and if his counsel are willing to let their witness rest under this imputation that he was swearing falsely and that his report would show it, we most certainly can, and we charge him at this time with false swearing concerning what his report was to Mr. Riley as to the condition of this dam and the work as he found it, and what recommendations he had made.

On page 348 the following proceedings took place.

Q—Did you further report: "The procedure for this design is to build a dike across the stream bed up stream from the present dam, so as to give access to the proposed trench, then to cut this trench by a steam shovel along the whole 2000 feet of the face of the dam, cutting to such depth, not less than 20 feet, as the finding of the cutting itself may show necessary: the material so excavated to be used for filling in the body of the dam itself. At the same time the present concrete face of the dam will be stripped off. When the proper time comes, after the trench has been fully excavated, it will be sluiced full of fine material washed out of the body of the present and accumulated fill. Thus the dam will

be changed from its present design by the addition of a great blanket of strong and impervious material on its up stream face." Did you so report?

A—That is part of the report I have just testified I made. It is explanatory of what I have just told you, and taken by itself, it utterly mis-states the tenor of my report.

According to this statement Mr. Storrow beleived that it was necessary to go up stream and to build a trench down to impervious material, which would be bedrock or clay, and which would be 20 feet deep or more in order to cut off the underground flow of water, and which the core wall does not cut off, and we think this is the true reason why it would be impracticable to take out the material next to the core-wall and put it back in, for the reason that doing that work would not stop the dam from leaking, and not because the cost of taking out this material and placing it back would be prohibitive. These statements of Storrow concerning the prohibitive cost of removing the gravel around the core-wall; that there was danger of the face of the dam sliding into the borrow pits when the borrow pits are higher than the toe of the dam, and his refusal to look at his report and to see that the statements that he was making under oath were correct, brands Mr. Storrow as a juggler of the truth.

On his direct examination Mr. Storrow testi-

fied that it would cost $100,000 to rebuild defective concrete on the drops in canals; half of that would be for putting in those piers. (Rec. 259).

Mr. Lynch who had the contract for putting in these piers and which was cut out of his work by the engineers in charge of the Big Lost River Irrigation Company to save expenses, says that he will put in all of these piers according to the plans and specifications for $5,000. (Rec 421).

Mr. Storrow was again asked if he had examined the head works of the Blaine canal, and whether he had compared them with defendants trustee's Exhibit 6, which is a drawing accompanying the specifications, and that he found a variation between the specifications and the way the head works were built, and we quote his answer in full.

"A—One of the principal variations is that the spillway in the headworks, intended to pass the floods, which are not wanted in the canal, and must be kept out by it, is shown on the drawing to have a width of 150 feet and a depth of 7 feet, effective waterway, whereas, as a fact, it is 125 feet along its crest instead of 150, by the same depth, of 7 feet. Another principal trouble, another principal difference from the specifications is that a wall carried up to a height of 7 feet above the crest of the abovementioned weir is shown on the drawings to have a length of 100 lineal feet, extending from the intake

of the Blaine canal outwards into the river towards the left bank of the river, for a distance of 100 feet, and thereby separating the overflow weir from the headgates by a high, strong concrete wall 100 feet long, whereas, as a fact, I found that the structure was built without that wall, or any wall whatsoever, excepting only such wall as formed part of the headgate known as the Darlington headgate, which has been introduced in place of this wall, and which is not shown in any way whatsoever on the specifications and drawings. I find that the drawings to which I have just referred show a gateway or sluiceway is called for at the right hand end of the overflow weir, where the 100 foot wall just mentioned and the weir come together, that is to say, on the right hand end, looking down stream, as we always do, at the right hand end of the overflow weir; this mud-way or gateway or sluiceway was actually built at the left hand end." (Rec. 259).

It is true that those headworks were not built according to the plans and specifications filed by the Big Lost River Irrigation Company with the State Land Board. The evidence, which is uncontradicted, shows that a blue print was delivered to us signed by the chief engineer calling for a spillway 125 feet across, and that instead of a wall seven feet high by one hundred feet long the plans and specifications that were furnished to us signed by the

chief engineer called for a wall only fourteen feet long; that instead of there being a mudgate or sluice-gate upon these plans and specifications that were delivered to us, there was none, and the engineers on the ground designed and had our subcontractor put it in. (Rec. 418.)

Again objection is made to the work as it is done at the bifurcation works of the Blaine canal. Mr. Storrow testifies that there was a certain wall built above the gates which was not in accordance with the plans and specifications. This is true, but Mr. Drummond testifies that the plans for putting in this work were submitted to the office at Chicago and that those plans were approved, and that the work was put in by Corey Bros. Construction Company according to the plans and specifications furnished by the engineer. Mr. Storrow is very positive in stating that this curtain wall was the cause of the wreck that took place upon the Blaine Canal during the spring of 1911.

We put Mr. Henderson, an employe of the receiver in this case, and an engineer, upon the stand, who explained in detail the cause of the Blaine wreck, and contradicts the dreams and imagination of Storrow. (Rec. 437, 438, 439.)

When this accident happened to the Blaine canal one of the gates at Antelope crossing had been partially left open, which let the water from Antelope

Creek into the Canal, and Mr. Henderson in trying to shut down this gate to keep the floods from cutting out the bank at Antelope crossing was unable to close the gate, and in order to relieve the pressure at that point, he opened both of the gates leading from Antelope Creek into the canal. This let the water down into Blaine canal, and the dirt around the cement structures having not been put in and the banks not being completed, this water worked in behind the cement work and tore it out. In full explanation of this accident we would call the court's attention to Mr. Henderson's testimony, found on pages 437-440.

Mr. Henderson further testifies that he examined all the cement work done upon these canals prior to this accident on the Blaine canal, and all of it was in first-class condition, and he exhibited photographs which are introduced in evidence, and to which we call the court's attention, being marked plaintiff's Exhibits Nos. 98 to 106.

To go back to the dam and to discuss a little further the manner of dumping material into the body of the dam counsel for defendants' trustees in his brief says that the specifications called for a trestle to be built in the upper and lower toe of the dam, and that material should be dumped from this trestle, and to quote his brief, he says:

> "The contract between complainant and the Irrigation Company provided that the ma-

terial from the borrow pits might be dumped from trestles 25 feet high, provided, those trestles were two in number only, one in the lower toe and the other in the upper toe of the dam, and both parallel with the core wall, and that all dumping should be done from these parallel trestles **towards** the core wall." (p. 24.)

Under paragraph 8 of the detailed construction of the dam we find the following:

> **"Forming Embankment:**
>
> "Embankment may be formed either by the use of teams or by steam shovels and cars. In case the material is placed by means of steam shovels and cars the contractor may either raise the embankment by shifting track, or by placing two trestles; one in the lower toe, and one in the upper toe of the rising embankment." * * *
>
> "The material between the trestles **may** be dumped from the cars toward the center of the dam, taking the general slope determined by the angle of repose of the material as dumped; the only limitation being that each trestle shall be used to the extent that practically the same weight of material is carried towards the center of the dam from each trestle."

This limitation was put into this contract for the purpose of having the dam erected uniformly, so that the pressure on each side of the core wall would

be uniform; thereby the core wall would not be sprung or broken.

This contract says that the material between the trestles **may be dumped** from the cars towards the center of the dam. It does not say that it shall be, and this last interpretation is put upon this contract by counsel for appellants' trustees and by their experts for the reason that it helps sustain their case.

This contract was furnished by Mr. Rosecrans, the chief engineer to Mr. Corey, and if there is any presumption to be indulged in Rosecrans drew this contract and he would be as well able to interpret its meaning as well as any other expert engineer. When he was at the Mackay dam in the summer and fall of 1909 he saw how the material was being dumped and he approved of that manner.

These engineers who represented the Big Lost River Irrigation Company were something besides mere inspectors to see that the work was done according to the written contract; they were the agents and superintendents for the Big Lost River Irrigation Company in constructing this work. They gave directions before the work was started how it should be done. They were in the field all the time directing and supervising this work, but we will argue this phase of the case a little further on more extensively.

We will agree with counsel that the effect of dumping material from a trestle 25 feet high that the

coarser material would naturally reach the bottom first. This is due to the law of gravitation; that the heavier material falls faster and goes to the bottom, and that the finer, lighter material remains on top. The result would be the same whether the trestles were parallel to the core wall or at right angles. Dumping from trestles parallel to the core wall would cause the coarse material to go towards and against the core wall.

This contract in its written specifications does not say that a stream of water shall be poured upon the dump so as to wash all the fine material towards that core wall, that is an interpretation devised by counsel and his engineers, which would be a reasonable interpretation we are ready to admit if the contract did not specifically define what portion of the dam should be wetted.

We are willing to admit that it would have been better to have wetted this dam completely over during its construction that the voids and holes should have been filled up with fine material, but the specifications and the orders of the engineers to us did not require it. All this wetting was done at an extra expense to the Big Lost River Irrigation company and its agents and superintendents, who were the engineers in charge, interpreted this contract and gave us explicit orders how it should be done, and the testimony is that we followed those orders.

Let us now pass on to the testimony of Paul S. Roberts, one of the witnesses called on behalf of the appellants' trustees, and in discussing Mr. Roberts' testimony, we may incidentally discuss a part of Storrow's testimony.

Mr. Roberts was a Carey Act inspector for the State of Idaho and commenced work inspecting this dam in the month of March, 1910. (We would call the special attention of the court to Mr. Roberts' cross-examination, commencing on page 273 and ending on page 342). On April 27, 1910, he made his first report on the Big Lost River Irrigation project to the State Engineer. (Rec. 275.) In that report he makes certain recommendations of matters that were not in the plans and specifications on file, and points out to the State Engineer how certain work should be done. In that report he speaks of the concrete work and says that the concrete at the end of the tunnel is complete and is free from cracks and checks and finished in a thorough and workmanlike manner. He further says:

> "I would suggest that the present retaining wall of concrete on this side of the controlling valves be extended fifty feet to prevent this erosion. (Rec. 276).

This suggestion made by Mr. Roberts was not in the plans and specifications on file with the State Engineer for the building of these works. Further on in his report he says:

"On April 26th the water in the reservoir had covered an area of 60 or 70 acres and the tunnel and controlling valves were flowing full and water along the face of the dam had covered the concrete apron for a distance of 32 feet, measured along the slope. As the water in the river is steadily rising it will cover more and more of this apron, preventing the placing of another layer of concrete to increase the thickness of the apron, as recommended." (Rec. 279.)

"Horizontal cracks have developed in this concrete apron, at the water line, and extends along the entire face of the apron. At the corner of the apron, where it turns back along the east portal of the tunnel, there is a vertical crack extending from the water line down the surface of the apron. The concrete on the dam side of this crack has settled below that on the portal side about four inches. This is due to the fact that the water getting under the apron at the bottom of the dam caused the material in the dam to settle away from the apron. **This cracking and local settling of the facing along the dam, I do not consider serious,** except that it indicates the necessity of making this facing six inches thick, as recommended in Mr. Fell's report of April 2, 1910." (Rec. 279.)

"Work on the spillway tunnel is progressing rapidly." (Rec. 279.)

He further says:

"He made no mention in this report to

the State Engineer that the irrigation company was not carrying out their contract with the state." (Rec. 280.)

"A force of carpenters were keeping well ahead of the concrete work with forms. The concrete in the finished structures is well put in and free from cracks and checks." (Rec. 284.)

"The concrete syphons on the north and south forks of the Antelope Creek crossing are finished. The forms are removed from the concrete on the north fork crossing, and partially removed on the south fork crossing. Temporary gates are installed in both syphons." (Rec. 284).

"The entire work is progressing as rapidly as possible and with the exceptions noted **is in good condition. The canals will be ready for water at the specified time."** (Rec. 292.)

So according to this report as made by Mr. Robers, while he was a Carey Act inspector of the State of Idaho, he had no fault at this time to find with the work being done on the Big Lost River project, except in minor details, which could be easily remedied.

On May 20, 1910, Mr. Roberts writes the following letter:

"Hon. D. G. Martin, State Engineer.

"Sir:

"I have been unable to locate a set of the specifications stamped with the state's ap-

proval for this work of the Big Lost River project. Mr. Drummond, the engineer on the work, has told me repeatedly that they were somewhere on the work, but my efforts have been unable to locate them. In view of the many rumors current here of injunctions by the railroad company and others stopping the work on account of its being dangerous to property in the valley, and the general fear of the community. I believe the above specifications should be here and always available; in order to protect the state I think it advisable to stop the work if necessary till the specifications are produced, and I ask for authority to do this. Mr. Drummond contemplates a change in the construction of the corewall which does away with the sheet steel piling in the last 50 ft. of the wall and instead of the piling excavating to a depth of 10 or 12 ft. before placing the concrete. The reason for this change is that boulders prevent the driving of the piling. I believe it to be a better construction to continue the steel piling as originally planned, and remove all boulders until the piling will drive to place. I told Mr. Drummond that I would not assume the authority for the change and for him to submit the change to you for your approval before going ahead. Respectfully," (Rec. 293.)

In this letter Mr. Roberts speaks of the many rumors current of injunctions by the railroad company and other persons to stop this work, and he

advises also that work be stopped until he could procure a copy of the specifications that Mr. Drummond —the engineer in charge—contemplates making a change in the construction of the core-wall. It is not Corey Bros. making the changes.

On May 27, 1910, he reports as follows: (Record 295.)

AT THE MACKAY DAM.

"The first, or foundation, section of the concrete core-wall, across the old channel of the river, is completed to within 100 feet of the west end of the dam. Before the concrete was placed, the earth in the forms was excavated to a firm foundation, which was from 5 feet to 7 feet below the top of the sheet steel piling. This allowed the concrete to take a firm bond with steel piling. There was several feet of water, but no flow, in the forms at the time the concrete was put in. The placing of the concrete began at the end of the section where the old concrete had stopped, and the new concrete was pushed down the slope of the old concrete into the water, continuing in this manner to the end of the forms. This method prevented any separation of the cement and gravel in the concrete. **At the center of the old river channel temporary openings are left in the core-wall. These openings are one square foot in area and spaced vertically two feet apart.** This is to allow a passageway for the considerable amount of water that seeps through the gravel embankment in

front of the core-wall. This water is now diverted around the core-wall. The second lift of the core-wall is being placed as rapidly as the foundation section has become hard. Two concrete mixers are being used and the work pushed as rapidly as possible.

"Film No. 5, Roll No. 1 shows the form work and concrete on this section of the core-wall.

"A force of men is removing the earth and loose rock from the cliff where the core-wall will join the solid rock on the west end of the dam.

"Work on the first and second lifts of the earth embankment in front of the core-wall is progressing simultaneously and as rapidly as possible. The first lift is nearly completed as far as the core-wall will allow, and the upstream section of the second lift is finished to within a hundred and fifty feet of the west end of the dam. Six gravel trains are now in operation on this work—the sixth locomotive being placed in commission on May 17.

"Film No. 4, Roll No. 2 shows the work on this part of the construction, and Film No. 6, Roll No. 2 shows the method of transporting the sixth locomotive from Mackay to the dam.

"The excavation of the tunnel section of the spillway channel is completed. There remains about twenty feet of open cut work to complete the entire excavation of the spillway channel." (Rec. 296.)

He concludes this report on May 27 by stating:

"The work in general is in good shape and progressing rapidly." (Rec. 303.)

On June 28, 1910, Mr. Roberts makes another report to the State Engineer. (Rec. 307.)

"Mackay, Idaho, June 28, 1910.

BIG LOST RIVER LAND & IRRIGATION CO.

Hon. D. G. Martin,

State Engineer,

Boise, Idaho.

Sir: I beg to submit herewith report on the progress of the work of the Big Lost River, Land & Irrigation Co.

MACKAY DAM.

"The up-stream section of the second lift of the embankment was finished on June 2nd and the dumping toward the core-wall, with the necessary shifting of track, begun. On June 3rd the water had risen in the reservoir, until it stood several feet above the base of this second lift. **The large stones which formed the base of this lift allowed the water to pass through the embankment. This seepage amounted to fifty second feet. In order to stop this seepage, a stream of water was played on the upstream face of the embankment and the foot of the embankment was puddled sufficiently to stop all seepage at this point.**

"Film No. 4 shows the dumping on the second lift toward the core-wall.

"The upstream face of the second lift of

the embankment has been dressed to proper slope.

"The steel sheet-piling was continued from the intended point of stopping, a distance of 80 feet to the base of the rock cliff at the west end of dam. The lengths of piling ranged from 18 feet at the river end of this section to 9 feet at the cliff end. **Each pile was driven to refusal, the last foot with considerable difficulty, indicating a compact stratum at the foot of the piling.**

"After the forms for the concrete were in place around the sheet-piling, the gravel within the forms was excavated to a firm foundation for the concrete. This excavation was about five feet below the original surface of the ground. Considerable water stood in the forms, and the concrete was so placed as to cause no separation of the cement and gravel.

"From the end of the sheet-piling, to the perpendicular face of the rock cliff, **the earth and float-rock was removed to solid rock. A** centrifugal pump working continuously during the excavation, kept the considerable amount of seepage water pumped out which allowed this excavation to be easily and thoroughly done.

"Film No. 3, Roll No. 3 shows the foundation course for the core-wall being placed, and Film No. 2, Roll No. 3 shows the excavation in the rock for the core-wall at this end of the dam.

"Film No. 5 and Roll No. 3 shows the first

lift of the embankment at the lower toe of the dam. This lift is completed to within 100 feet of the west end of the dam.

"Film No. 1, Roll No. 3 shows the wooden covering over the three valves at the outlet tunnel, next to the rock. This covering is made of 12 by 12 inch timber uprights, with 12 by 12 inch timbers placed close together forming a tight roof. The timber are fastened together with half-inch iron dowel pins, 16 inches long, driven with sledges. The other three valves will not be covered.

"Film No. 6, Roll No. 3 also shows the method of forming the second lift of the embankment toward the core-wall. It also shows the concrete gang taking the material from the embankment for the concrete of the core-wall.

"This view further shows the trestle being built for the third lift of the embankment toward the east end of the dam. This trestle extends from the present end of the third lift at the upstream face of the dam, across the embankment and core-wall at an angle of fortyfive degrees, to the lower side of the dam. dumping at the upstream end of the trestle It is the intention of the contractor to begin where the third lift now ends, and continue across the dam to the lower side and then parallel to the dam to the cliff at the west end.

"This method is directly opposed to the specifications which say: Page B13, paragraph 8, Forming Embankment—by placing

two trestles, one in the lower toe, and one in the upper toe of the rising embankment.—The material between the trestles may be dumped from the cars toward the center of the dam, taking the general slope determined by the angle of repose of the material as dumped; the only limitation being that each trestle shall be used to the extent that practically the same weight of material is carried toward the center of the dam from each trestle.' It is obvious that the intended method of forming this portion of the third section of the embankment will not cause the same weight of material to be carried towards the center of the dam from each trestle. I took this matter up with Mr. Jones, the engineer of the work, but he seemed to think the intended plan was all right, in that it was easier for the contractor to do it this way. I insisted that the specifications be followed strictly.

"No work has been done on the spillway, as the blasting rolls rock and dirt into the excavation for the core-wall below the spillway, preventing the continuing of work on the core-wall.

"Work on the dam has been considerably delayed during the last month on account of delayed shipments of coal." (Rec. 320.)

Mr. Roberts then proceeds to give his report on the Era, Arco and Powell tracts.

He concludes this report by saying:

"On June 17, Mr. J. B. Lippincott, engi-

> neer of Los Angeles, Cal., arrived at Mackay to make an investigation of the conditions at the dam, in the interest of residents and property owners of Mackay. Mr. Lippincott's investigation was most thorough, ending on June 20, at Blackfoot with an interview of Mr. Munson who did the boring at the dam site for bed rock. Mr. Lippincott's report, which will not be favorable, is expected about July 10." (Rec. 316.)

Mr. Roberts further testified that he was a public officer at the time he made these reports and that he had a public duty to perform and that he did perform it.

In analyzing this report of Mr. Roberts, dated June 28, 1910, we find that the contractor was dumping gravel in accordance with the specfications toward the core-wall. That the sheet-piling was driven to refusal, indicating a compact stratum at the foot of the piling. That the forms for the concrete around the sheet-piling was excavated to a firm foundation. That from the end of the sheet-piling, to the perpendicular face of the rock cliff, the earth and float-rock was removed to solid rock, and that pictures were taken showing all of these conditions, which were forwarded to the State Land Board, and in this report we first find that Corey Bros. Construction was crossing the core-wall with their railway at an angle of 45 deg., and was threatening to dump material on a 45 deg. angle to the core-wall. It appears from Mr.

Storrow's testimony that about 1500 or 2000 yards of material was dumped from this track. It appears from Mr. W. E. Corey's testimony that about 1000 yards was dumped from this trestle, so this is the first material that was dumped from a trestle not parallel to the core wall. It is true that Mr. Storrow and Mr. Green said that they found indications that other material had been dumped from tracks not parallel to the core wall. How these people could look into an embankment of dirt 2000 feet long, 600 feet wide and 50 feet deep and tell how much material below the surface had been dumped from trestles not parallel to the core wall, is more than counsel can explain.

On August 27, 1910, Mr. Roberts made another report upon the Big Lost River Irrigation Company, in which he says:

> "All excavation and embankment on the entire system is exceedingly well done. With the exception of a few cases of faulty concrete work, as noted in previous reports, the structures which are now completed are well built. At the present time there is no work being done at any point on the entire project." (Rec. 342.)

By the reading of these reports it will appear that the state was fully aware of how all this work was being done, and that it approved of all the work in its principal details, except when it compelled the

Big Lost River Irrigation Company to stop work on the dam on the 19th day of July, 1910.

The minutes of the Big Lost River Irrigation Company were introduced in evidence and show that soon after the Big Lost River Irrigation Company was organized, to-wit, July 16, 1909, that George S. Speer became owner of practically all of the stock of the corporation. (Rec. 586.) George S. Speer was the vice president of Trowbridge & Niver and had been very active in the organization of the Big Lost River Irrigation Company, and as the evidence shows was taking a leading part in financing said company. Mr. Speer lived in Chicago, the same city where the Arnold Company resided, and according to the testimony of Mr. Rosecrans, the Arnold Company was looking to Trowbridge & Niver for its pay. (Rec. 378.) This is the testimony of Mr. Rosecrans, so it is not presumptious to indulge in the speculation that Trowbridge & Niver and Mr. George S. Speer were keeping themselves informed of the progress of work done upon this system from the Arnold Company; in fact, the Arnold Company furnished to Trowbridge & Niver a copy of all the estimates that it furnished to Corey Bros. Construction Company. It would be for the interest of Trowbridge & Niver before they paid Corey Bros. Construction Company its estimates to know that said estimates were correct, and that Corey Bros. Construction Company was doing its

work according to the contract. There was much correspondence passing between Trowbridge & Niver, George S. Speer and Corey Bros. Construction Company, and we would call the court's attention to this correspondence which is found in the Exhibits, and which has been transcribed.

Plaintiff's Exhibit 94 (Rec. 555) is a letter dated March 12, 1910, from Trowbridge & Niver, signed by George S. Speer to Corey Bros. Construction Company, and in part reads as follows:

> "We are pleased to note that you are organizing your forces on the Lost River and that you will be at work in a short time with full forces. Have written the State Engineer of Idaho requesting him to make a trip of inspection in the near future and to report the progress that was being made, so that if there was reasonable assurance that water would be available for all the farmers who needed it by May 1, that the company could send out the necessary thirty days' notice to the land owners and thus come under the wire for the spring of 1910. We sincerely trust that you will be able to convince the State Engineer that you will be able to deliver water by May 1, even though the reservoir and some other parts of the project may not be entirely completed by that time.
>
> "This will make the quickest Carey Act project ever constructed and ought to be a splendid advertisement for both Corey Bros.

and Trowbridge & Niver Company and we wish to compliment you on the way in which you have handled the work and only regret that you were not the successful bidder on the Colorado Southern project."

On March 29, 1910, Trowbridge & Niver, through George S. Speer, again writes to Mr. W. W. Corey, in which Mr. Speer states that they understand it will be impossible to deliver water on all the contracts by May 1, and he winds up the letter by saying "we fully appreciate the strenuous efforts which you are putting forth for the completion of this work." (Rec. 556.)

In none of this correspondence does Mr. Speer or Trowbridge & Niver find fault with the way in which this work was being done.

Work was stopped upon this dam by order of the State Land Board about July 19, 1910; after this work was stopped the Arnold Company delivered to Corey Bros. Construction Company on the 31st day of July, a certificate for all work done upon this dam, and for all work done upon the whole system.

On August 31 the Arnold Company issued another certificate signed by their engineers that there was so much due for work done, and it is upon these last certificates that we are basing the amount of our recovery.

Does counsel mean to say to this court that the

Arnold Company or that Trowbridge & Niver or Geo. S. Speer or the Big Lost River Irrigation Company did not know what the true condition of affairs were? The state stopped work not that Corey Bros. Construction Company was at fault, but because the Big Lost River Irrigation Company was at fault. If the Corey Bros. Construction Company were at fault, would not the Big Lost River Irrigation Company and the Arnold Company have been only too glad to have placed it upon the shoulders of the contractor?

Under this contract between Corey Bros. Construction Company and the Big Lost River Irrigation Company all the work must be done to the satisfaction of the engineers, and any work done or material furnished by the contractor could be condemned and thrown out.

If Engineer Drummond was so complacent and was so corrupt as the defendants' trustees would infer that he was, why haven't the Big Lost River Irrigation Company and the Arnold Company repudiated his actions? This cry put forth by the defendants' trustees that Drummond was corrupt and that Corey Bros. Construction Company was a main party to that corruption is nothing but a false issue injected into this case to distract the court's attention from the true issues. If Drummond was corrupt, then we have Mr. C. B. Hurtt, president of the Big Lost River Irrigation Company, Mr. George S. Speer, one of the

directors, Mr. James E. Clinton, the receiver of this court, condoning and confirming that corruption.

We have evidence in this case that neither Mr. C. B. Hurtt, president of the Big Lost River Irrigation Company, nor has any other officer found fault with the contractor's work. Neither have they made nor do they now make any claim for damages on account of the work done by Corey Bros. Construction Company. (Rec. 451.)

On July 15, 1910, the State Board of Land Commissioners entered an order that the Big Lost River Irrigation Company discontinue all work on the Mackay dam. Part of that order reads as follows:

> "It appearing from the report of State Engineer and from the Carey Act Inspectors, that the construction company in the construction of the Mackay dam is not complying with the specifications of the said contract with the state, and that their attention has been repeatedly called to the fact by the said State Engineer and objections to the said construction having been made and requests that the said company perform said work in accordance with the contract and the plans and specifications approved, and that said company has failed and does now refuse to comply with said specifications and said contract, and to construct the said dam in accordance therewith:
>
> "Be it Resolved, That all work upon said dam be discontinued and disapproved until the same is constructed in accordance with the

said contract and with the approval of the State Engineer."

From reading this resolution it would appear that the State Land Board on an ex parte complaint, made to it by the State Engineer, stopped work.

Mr. Paul S. Roberts was the Carey Act Inspector and was the officer who made the reports on the construction of this dam.

On May 20, 1910, Mr. Roberts wrote to the State Engineer that he was unable to find a copy of the specifications and he asked for authority to "stop all work until the specifications are produced."

On May 27, 1910, Mr. Roberts again made a report to the State Engineer, and in that report he has no serious objections to the dam or any of the system.

On June 28, 1910, he makes another report to the State Engineer and in this report he finds fault with Mr. Drummond, the engineer, and states that it is the intention to dump gravel from a track crossing the core wall diagonally, and he recommends that this method be not permitted. This is the first serious objection that any of the engineers representing the state has made, and as this record shows it was upon this evidence that the State Land Board stopped the Big Lost River Irrigation Company from doing any more work on the dam until it should comply with the plans and specifications. This was something that could be easily remedied and the gravel that had been

dumped from this track could easily have ben removed and Corey states in his testimony that he would have been willing to have removed it if the engineers should demand it. This being the first serious objection that the State Engineer had in the construction of this dam and canal system, it is fair to presume that there were no serious objections prior to June 28, and that the State Engineer's office approved the manner and method of doing this work.

Mr. Roberts speaks in one of his reports that the citizens of Mackay have employed Mr. Lippincott, an engineer, to inspect this dam, and that he understands that Mr. Lippincott's report is not favorable. What Mr. Lippincott's report is does not appear in this evidence, but it is safe to conclude that the State Land Board was induced to stop work on this project on account of the action of the citizens of Mackay rather than upon any report made by Mr. Roberts.

A casual reading of the contract and specifications drawn up by the Arnold Company, and which was signed by the Big Lost River Irrigation Company and Corey Bros. Construction Company show that said contract in its terms are indefinite, contradictory and misleading, and in pointing these inconsistencies out, we will use the language of an eminent engineer who made a report to the State Land Board of Idaho upon this contract.

"Mr. Lippincott has said in his report that the specifications are misleading. We consider that he has been very mild in this statement. They are not only misleading, they are incomplete, indefinite, contradictory, and erroneous. They are silent where they should specify, and, when they specify, they sometimes specify wrong methods;

"They are **incomplete** because they omit some of the most important details necessary for the successful construction of a dam; as, for instance, the method of mixing the various ingredients of which the body of the dam and the puddle core is composed.

"They are **indefinite** because they do not **define**; as, for instance, where they speak of the 'material' of which the puddle core is to be composed without mentioning what it is. And both indefinite and **erroneous**, in stating that 'there is an impervious bed of clay and 'gravel' underneath a bed of gravel (about 2000 feet long) 'averaging about 15 feet in thickness.' They should have stated the maximum and minimum depth of this layer of 'impervious clay and gravel,' and its thickness. Obviously if it were only an inch thick, one would not take the risk of founding an important structure upon it. Again, when they say that a "trench is to be backfilled with **material**' without specifying what this material is to be, or how it is to be placed.

"They are **contradictory** when they call for a method of placing the material in the dam

which shall insure a mixture of the materials, and specify a method of placing it which will effect a separation instead of a mixture. Again, where they specify **'earth'** as a 'mixture of earth and gravel containing over 10% of earth' in par. 4, clause 4, sec. 11, and 'gravel' as 'all gravelly material' containing 90% of clean washed gravel' in the very next paragraph. According to the specifications, if the material contained exactly 10% of earth and 90% of gravel, it would be 'gravel;' but, if it contained 10½% of earth and 89½% of gravel, it would be 'earth.' One would naturally suppose it was still 'gravel.' This classification, although not absolutely contradictory, is so near it as to show that the writer of the specifications had no clear conception of the difference between earth and gravel. Earth and gravel properly mixed and placed in an earthen dam, will make a water tight structure, but material containing 90% of gravel, dumped promiscuously in a heap, without any attempt at mixing or proper compacting, will not do so.

"The specifications relating to the formation of the dam are entirely inapplicable to the material of which this dam is composed. With its aggregates properly segregated and disposed, this material might have been built into a water-tight structure, and it is possible that the foundation might have been rendered secure from the passage of large amounts of water through or under it, but these things

could not, and have not, been done under these specifications."

* * * * * * * *

"There is no provision in the specifications for making the body of the dam tight, but great reliance seems to have been placed on saturating a portion of the same material used for the body of the dam, and thus creating so-called 'puddle material' in the center of the dam.

"There is no definition of 'puddle' or 'puddling material' in these specifications—a fatal omission. It is vaguely alluded to as 'the material' in clause 8 of the 4th section, and the only inference that we can draw from this definition is that the material alluded to is that of which the dam is composed, viz: gravel with 10% of clay."

We have no hesitancy in stating that if the work done by Corey Bros. Construction Company upon the dam of the Big Lost River Irrigation project is a failure that such failure is entirely due to the engineers of the Big Lost River Irrigation Company. The engineers of the Big Lost River Irrigation Company changed the open spillway to a tunnel spillway, and this was a saving to the Big Lost River Irrigation Company of about $3,000.00 or $5,000.00. (Rec. 431.)

The evidence further shows that the engineers cut out some of the piers on the main canal and other cement work and that this was a saving to the Big

Lost River Irrigation Company of $30,000. (Rec. 422 top of page.)

There is no evidence in this record but what the contract that Corey Bros. Construction Company had for the doing of this work was a profitable contract and according to the testimony of Mr. W. W. Corey, his company would only have been too glad to have made an open spillway, to have put in the cement piers and to have done all the other work which the engineers cut out in order to save expense. (Rec. 430, 431.)

Engineer James A. Green, an expert called on behalf of appellants' trustees, on his direct examination said that he should judge that approximately 40,000 or 50,000 yards of material had been dumped in the dam from trestles crossing the core-wall at an angle, and that he estimated that ten second feet was percolating through the dam, and that this water had to percolate through six hundred feet of fill from the upper to the lower toe. (Rec. 403.) On cross-examination, he said that he roughly estimated the amount dumped from diagonal tracks to be 40,000 to 50,000 cubic yards and that 150 cubic yards was dumped parallel to the core-wall. (Rec. 407.) How the other 420,000 yards were dumped, he does not attempt to explain. He further says that he did not measure the water coming through the dam, and that there was a hole through the core-wall; that

he measured the water by guess. (Rec. 409.) He further stated that he could not tell from looking at defendant's Exhibit No. 1 (which was a blue print drawing of the dam), how deep the trench was to be dug for the core-wall, yet within three minutes afterwards on re-direct examination he says that the blue print shows that the core-wall was to be six feet below the original ground. (Rec. 408-409.)

Engineer W. F. Day, an expert witness called on behalf of appellants' trustees, said that there was from five to ten second feet coming through the dam, and that there was a hole in the core-wall. (Rec. 411-412.)

We do not deny but what there was water coming through the dam and that there were holes in the core-wall. It was necessary to leave these holes in the core-wall in order to construct the dam. Those holes were in the core-wall when Storrow was there and when Binckley was there and when all the other engineers were there, and the water was flowing through this core-wall. These holes are still there and probably always will be there, unless this dam is completed. It was the intention of the builders of this dam and of the engineers that as soon as possible that these holes would be filled up with concrete.

On May 27, 1910, Paul S. Roberts, Carey Act Inspector, and one of appellants' trustees' witnesses

reported to the state enginer as follows: "At the center of the old river channel temporary openings are left in the core-wall. These openings are one square foot in area and spaced practically two feet apart. This is to allow a passageway for the considerable amount of water that seeps through the gravel embankment in front of the core-wall." (Rec. 296.)

On page 32 of appellants' brief we find the following statement: "And inasmuch as these specications were identical with those attached to and made a part of the Corey Company's contract, this finding by the state was a finding that the Corey Company had in vital parts departed from its contract with the Irrigation Company."

We wish to state to this court that the evidence in this case is uncontradicted, that some of the blue prints that were furnished to us by the engineers of this company signed with the name of W. H. Rosecrans, and bearing the same number as the blue prints attached to the contract made by the Big Lost River Irrigation Company and the State of Idaho, were entirely different. About one-half of Mr. Storrow's time on direct examination was taken up in reference to the canal system outside of the dam proper.

When we put the sub-contractor, James A. Lynch, on the stand, who did all the concrete work on the canals and introduced the specifications as

represented by the blue prints, we found that these blue prints were entirely different from those blue prints from which Mr. Storrow gave his testimony, and which were properly a part of the contract made between the Big Lost River Irrigation Company and the State of Idaho. (Rec. 418-419.

I suppose counsel for appellants contend that we are to be held responsible for not having the right blue prints.

Counsel for appellant in their argument in the lower court pratcically abandoned all reference to Mr. Storrow's testimony concerning the construction of piers and the work on Antelope Crossing and the cement work done on the Blaine stub.

Counsel on page 35 of their brief try to minimize the effect of the engineers delivering to us different blue prints signed with the name of W. H. Rosecrans as chief engineer and bearing the same numbers as the blue prints on file in the State Engineer's office for the construction of this work by saying that these blue prints were delivered to us by sub-engineers. All these blue prints, with one exception bear the stamp of Arnold & Company, with the names of the engineers signed to them.

On page 24 of appellant's brief we find the following: "Up to the time Coy left the departures from the contract, so far as they concerned the work upon the dam, were of minor consequence when compared

with those which occurred afterwards. After Corey had gotten rid of the obnoxious young engineer Coy, and after Raschbacher had been succeeded by the very friendly Drummond, Corey began a practice upon this dam which, alone and unaided by any other departures from the contract, was sufficient to render the dam a useless structure."

Coy was the engineer in charge of the dam and he is the engineer that laid out the trench of the core wall and told Corey how deep it should be excavated.

Storrow in his testimony says that this core wall was not placed upon solid rock or upon impervious material, and the water freely passed beneath it.

Coy was there when the rock from the tunnel spillway was being dumped inside of the limits of the dam proper pursuant to instructions from Mr. Raschbacher, (Rec. 186) the engineer in charge. Coy was there when the ground was being plowed upon which the dam was to rest. Coy was there when the first material was placed next to the core-wall. Coy was there when the first wetting of the material around the core-wall was done.

Storrow found fault with all of this.

Coy says that Corey Bros. Construction Company performed its contract while all this was done, and counsel in their brief say all departures while Coy was there from the specifications of the dam

were immaterial. Counsel have stated in their brief that as soon as Corey Bros. Construction Company had got rid of the obnoxious Coy, then the company began a practice upon the dam which, alone and unaided by any other departures from this contract, was sufficient to render the dam a useless structure, and this practice was that most all of the gravel dumped into this dam was done from trestles built at right angles or diagonal to the core-wall, and the only testimony that they have in support of this contention is that Paul S. Roberts, the Carey Act inspector, says that a few thousand yards were dumped from one diagonal trestle, and that a few thousand yards might mean any number of yards up to 50,000, but exactly how many thousand yards, he was unable to state. (Rec. 334.)

Storrow says that there were about 1500 or 1800 yards dumped fro mthis trestle. Rec. 249.)

W. E. Corey says that there were about 1,000 yards dumped (Rec. 212), and this is the only direct evidence in this whole record that we have that any other material put into that dam was dumped otherwise than from trestles built parallel to the core-wall.

It is true that James A. Green testifies that 40,000 or 50,000 yards was dumped from trestles not parallel. This testimony is also followed that there was only about 150 yards dumped parallel to the wall. What was done with the other 420,000 yards

remains a mystery as far as Mr. Green's testimony is concerned.

Coy says on cross-examination there was one or two controversies (referring to controversies between Corey Bros. Construction Company and himself). One in particular was due to the fact that they did not follow my instructions for awhile—for an hour or so they did not——finally they came around and did the work as I wanted them to do it. (Rec. 392.) From this testimony counsel for appellants have built a mountain.

Mr. W. W. Corey says in his testimony the reason that he asked Coy to be removed was because he had a controversy with my foreman, and I came along and Coy said: "Corey, if you don't make this man do as I tell him, I will shut him down in a minute." I said, "What is the matter?" and he said, "This man don't obey my orders." I said, "If he don't obey your orders, I will make him lose his job." I said, "You don't need to ask anything more of me, if you will let me know what you want." That was the substance of it. I wrote the letter the next morning. (Rec. 435.)

Mr. Corey's letter to the chief engineer, W. H. Rosecrans, and Rosecrans' reply are found on pages 545 and 547 of the record.

Mr. Corey asked for Mr. Coy's removel on the ground that he was overbearing and insulting in his

manner; nothing unusual to be found in young people who are vested with a little authority.

George H. Binckley was another expert engineer called by appellants' trustees. It appears from Mr. Binckley's testimony "that on or about the 1st of August, 1910, he left Chicago and went out to the Mackay dam to close up Arnold & Company's affairs. While there Mr. Binckley states that he had a conversation with W. W. Corey, president of Corey Bros. Construction Company, and that Corey stated to him the reason why the water was flowing through the dam was that some of the rock from the spillway had been deposited in the dam and that a concrete floor at the bottom of the concrete facing had not been put in place in the old channel of the river and that he was satisfied a good deal of water was going through in the old channel." (Rec. 394.)

W. W. Corey in his testimony states "that he probably had a talk with Binckley during the summer or fall of 1909 about the water coming through the dam. I didn't tell him where I thought it came from or where it did come from, because I didn't know then and I don't know yet. That dam is not completed." (Rec. 430.)

Binckley's testimony is very significant in one phase of it. He was sent out there by Arnold & Company on the 1st of August to close up Arnold & Company's affairs. Work had been stopped by the state

on the 19th day of July preceding, for the reason that the Big Lost River Irrigation Company was not building the dam according to the contract made between the Big Lost River Irrigation Company and the State of Idaho, not because Corey Bros. Construction Company was not building the dam in accordance with the instructions of the engineer. Arnold & Company knew that the State had closed down the work on the dam, yet it made no investigation to find out who was at fault.

On the 31st day of June, 1910, the Arnold Company furnished to Corey Bros. Construction Company a certificate for work done upon this dam for the month of July. On August 31 Arnold & Company again furnishes Corey Bros. another certificate for work done upon this system, and during all of this time there is no complaint and there is no intimation but what Corey Bros. Construction Company has properly performed its contract.

At the time this work was stopped upon this dam C. B. Hurtt, president of the Big Lost River Irrigation Company was in Chicago, and he had a talk with Mr. Rosecrans and with Ralph G. Arnold of Arnold & Company, and both of these people told him that Corey Bros. Construction Company had propertly done its work and had followed the plans and specifications. (Rec. 451.)

William M. Wayman was also in Chicago at the

same time Mr. Hurtt was. Mr. Wayman was interested with Clinton, Hurtt & Company, to whom the Big Lost River Company was heavily indebted, and he had a talk with Mr. Rosecrans and Mr. Arnold and both of these people told him that Corey Bros. Construction Company had done its work and that the work was first-class, and that the company had lived up to the plans and specifications. (Rec. 448.)

It is true that their testimony is denied by Mr. Ralph G. Arnold and Mr. Rosecrans, yet taking all the surrounding circumstances, we believe that Mr. Hurtt and Mr. Wayman are telling the truth.

The state had stopped work upon the dam and Arnold & Company makes no investigation whatever to find out the cause of it to fix the blame, and Mr. Ralph G. Arnold in his testimony says, on cross-examination, "I though Mr. Corey did his work pretty well, so far as I know." (Rec. bottom of page 383.) Not one of the officers of the Big Lost River Irrigation Company has ever contended but what Corey Bros. Construction Company performed its work according to the plans and specifications under the directions of the engineers of the Big Lost River Irrigation Company.

It is true that Corey Bros. Construction Company gave Raschbacher a diamond ring. That was after he quit work on the Big Lost River project. Mr. Corey says this was done as a friendly act; that

he wanted to be on pretty good terms with him, thinking he might assist him with information or something about another job. (Rec. 432.)

On pages 37 and 38 counsel for appellants seek to explain away the refusal of Storrow to read from his report that he made to Mr. Riley concerning this dam, and the refusal to let counsel for appellees look at that report. And counsel further said that it was a private communication made for specific purposes unconnected with any issue in this case. Counsel further say: "It would seem to be a sufficient reply to this charge that counsel for plaintiff, during the cross-examination of Storrow, succeeded in getting possession of a copy of Storrow's report to Mr. Riley, and read from it with more or less accuracy to the witness."

Counsel have made this statement voluntarily to this court without any evidence to support it. And counsel further know that I endeavored to get a copy of that report, both from Mr. Storrow and from them, and was each time "turned down." (Rec. 352.) I have never seen Mr. Storrow's report or what purported to be a copy. That statement is a brazen and impudent one, recklessly made and without any evidence to back it. But this statement is no more recklessly made than about one-half of the other so-called facts stated by counsel in their brief.

Does It Lie in the Power of the Trustees to Make the Defense that Corey Bros. Construction Company Did Not Comply With Its Contract With the Big Lost River Irrigation Company?

When counsel for the trustees sought to introduce evidence under their affirmative matter, the attorney for the appellees in this case objected to any testimony offered, for the reason that there was no privity of contract between Corey Bros. Construction Company and the trustees to raise that issue, and also upon the ground that it did not lie in the mouth of the trustees to raise that issue, and further upon the ground that the trustees had not asked for affirmative relief by way of cross-complaint. (Rec. 248.)

That there is no privity of contract between the plaintiff, Corey Bros. Construction Company, and the defendant trustees needs no discussion.

If the trustees defendant are entitled to raise this issue, it is due to the fact of their relation with the Big Lost River Irrigation Company. The right of the trustees defendant to raise this issue would be no greater, if as great, as the Big Lost River Irrigation Company.

The Big Lost River Irrigation Company has appeared in this action and filed an answer and was present at the taking of testimony by its attorney.

Its answer consists of certain admissions and denials of the allegations of plaintiff's bill of complaint.

According to the estimates made by the engineers of the Big Lost River Irrigation Company and the undisputed evidence in the case, Corey Bros. Construction Company has furnished material and done work upon said canal system for the Big Lost River Irrigation Company amounting to the sum of $1,214,003.51; it has been paid the sum of $691,119.48, leaving a balance due to Corey Bros. Construction Company from the Big Lost River Irrigation Company of $522,884.03 together with interest. That Corey Bros. Construction Company performed work and furnished material for the Big Lost River Irrigation Company, and that it has not been paid in full is not sought to be denied by the trustees, and the question arises if Corey Bros. Construction Company has not performed its contract and the defendant Big Lost River Irrigation Company has been damaged by the neglect and fault of the plaintiff, how could the Big Lost River Irrigation Company raise that issue, if it had sought to raise it?

If this action had been brought in the state courts and Corey Bros. Construction Company had proven the same facts as it has proven in this case, Corey Bros. Construction Company would have been entitled to a judgment, unless the Big Lost River Irrigation Company had set up by way of off-set or re-

coupment that on account of the failure of Corey Bros. Construction Company to perform its work according to its contract, said company had been damaged, and it would have been incumbent upon the Big Lost River Irrigation Company to prove by a preponderance of the evidence that Corey Bros. Construction Company had not complied with the terms of its contract, and to further prove the amount of damages that it had suffered thereby, and the difference between what Corey Bros. Construction Company claimed to be a balance and what damages the Big Lost River Irrigation Company had proven, if any, would have resulted either in a judgment for the plaintiff, Corey Bros. Construction Company, or in favor of the Big Lost River Irrigation Company.

Off-set or recoupment claimed by the defendant is an affirmative defense, and the burden of proof is upon the party who makes such defense.

If the Big Lost River Irrigation Company had attempted to raise the defense in this action that it had been damaged by the failure and neglect of Corey Bros. Construction Company to properly perform its contract, and had asked for damages on account of such negligence and failure, that defense could have been made only by the Big Lost River Irrigation Company in a cross-bill, if such a defense could be made at all.

It is well established by decisions of the Federal

Court that the defendant cannot be granted affirmative relief unless by way of cross-bill.

Brande vs. Gilchrist, 18 Fed., 465;
Newton vs. Gage, 155 Fed., 608;
A Federal equiy suit by Simkins, page 469 and cases cited.

Is it not incumbent upon the defendant trustees, if it seeks such an affirmative defense, to proceed in the same way?

If the Big Lost River Irrigation Company had raised such an issue as damages by a cross-bill, the lower court, at the request of plaintiff, would, in all probability, have submitted such an issue to the determination of a jury, and would have held the determination of the foreclosure of the mechanic's lien in abeyance until such issue of fact could have been tried by a jury.

It has been held a great many times that Federal equity courts do not look with favor upon set-offs, unless the set-offs arise out of the same contract between the same parties.

Dade vs. Irwin, 2 Howard, 283;
Farmers' Loan & Savings Co. v. Northern Pacific Realty Co., 58 Fed. 266.

The Big Lost River Irrigation Company has not defaulted in this action, and it has raised such issues by its answer as it thought best to put plaintiff upon the proof of its claim, and it has not raised the issue

that the work was done in a negligent or faulty manner; in fact, the testimony of Mr. C. B. Hurtt, president of the Big Lost River Irrigation Company shows that all the work done upon this project by Corey Bros. Construction Company was for the benefit of the Big Lost River Irrigation Company, and that neither he as president nor any director has ever made any claim that Corey Bros. Construction Company had not performed its contract in full as far as the work was done.

Corey Bros. Construction Company had no contract with the State of Idaho; its contract was with the Big Lost River Irrigation Company, and as far as Corey Bros. Construction Company and the Big Lost River Irrigation Company were concerned, those two companies could vary or modify their written contract at any time, and no one could find fault unless it be the State of Idaho, and the State of Idaho could find no fault with the Big Lost River Irrigation Company varying or modifying the performance of the contract with Corey Bros. Construction Company, unless such modification materially interfered with the contract between the State of Idaho and the Big Lost River Irrigation Company.

As we have heretofore said, the Big List River Irrigation Company is satisfied with the way Corey Bros. Construction Company did its work. This being so, the defendant trustees, in order to make a real

or fictitious issue, should have alleged and proven that the Big Lost River Irrigation Company has a good defense or off-set against part or all of the claim of Corey Bros. Construction Company, and that there was fraud or collusion between the officers of the Big Lost River Irrigation Company and Corey Bros. Construction Company for Corey Bros. Construction Company to obtain a larger judgment than it was legally entitled in equity and good conscience, and that on account of said fraud and collusion between said parties, and on account of said judgment being for a larger amount than was justly due, the defendant trustees' security was in danger of being partially or entirely destroyed. There is no such allegation in defendants' answer, and they have not introduced one scintilla of evidence showing that there is any such fraud or collusion. Without such allegations of fraud or collusion and without any evidence supporting it, it must necessarily follow as a corollary that if the Big Lost River Irrigation Company is satisfied with Corey Bros. Construction Company's work, that the defendant trustees must also be satisfiied, willingly or unwillingly.

Mr. Phillips on Mechanics' Liens states the proposition as follows:

> "It is too well settled to admit of dispute, that if full performance in minor particulars be dispensed with by the party to whom it is

due, this will not prevent the builder from filing his lien on the contract, as between lien creditors. In the absence of fraud, creditors have no right to rip up the settlement of the parties. If they could do that, they might invalidate the lien because the original contract was too liberal in price. Self-interest, in the absence of fraudulent motives, is regarded by the law as a sufficient guaranty that men will not pay, or agree to pay, more than they ought to pay when liquidating their transactions, or agree that contracts in their favor are complied with when they are not; and for this reason these contracts, be they settlements or otherwise, are allowed to stand when unimpeached in their honesty. It would lead to frightful litigation if creditors might attack all liens where complete performance was defective in some inferior particular, but which the parties, judging honestly for themselves, thought proper not to insist on. Such a principle, it is said, if carried to its legitimate results, would disturb half the judgments confessed on settlements throughout the country. and therefore, where a building erected under contract is substantially completed, full performance in minor particulars may be dispensed with by the party to whom it is due; and a mechanics' lien filed by the builders thereafter is valid against other lien creditors."

Phillips on Mechanics' Liens, 3rd Edition, paragraph 254.

Counsel for appellants' trustees have cited a number of cases to overcome our objection that these defendants trustees are in no position to make the defense that they are trying to make. We have carefully examined each and all of these cases, and in our opinion they do not overcome our objection.

The case found in 113 Ga., is not in point, for the reason in that case the plaintiff, lienor, was trying to claim a lien upon property upon which he had made no improvements, and upon which the mortgagee held a mortgage. Such a defense is always open to a mortgagee.

There are other defenses open to a mortgagee, such as that the party who claims a lien has not complied with the statute in perfecting his lien; that the party did not commence his action within the period of the statute of limitations. All these and many other defenses are open to mortgagees to defend, but when it is admitted that the party who claims a lien has done work upon a piece of property and has not been paid for the same, and has complied with all the statutory requirements in filing his lien and in bringing his suit, it does not lie in the power of a mortgagee to say that the lienor has not fully complied with all the terms and conditions of the contract made with the owner, and this is especially so when the owner of the property says that he is satisfied with the work done by the mechanic or contractor.

In the case at bar we have Mr. C. B. Hurtt, president of the Big Lost River Irrigation Company, testifying that that company makes no objection to the manner and method that Corey Bros. Construction Company did its work, and that he, Hurtt, had a talk with the chief engineer in Chicago after the work had been stopped by the state on the Mackay dam, and that the chief engineer told him that Corey had complied with all the conditions and terms of his contract. It is true that the chief engineer contradicts this, but taking the circumstances under which this conversation took place, we believe that Mr. Hurtt is telling the truth, and while the chief engineer may not be intentionally telling a falsehood, he has forgotten.

Mr. Wayman also testified to conversations with Mr. Rosecrans, and Rosecrans stated to Wayman that Corey Bros. Construction Company had complied with all the terms and conditions of its contract.

We have no criticism to make of the authorities cited by appellants' counsel in relation to what the powers of an engineer or architect are under the facts in each of those cases cited, but counsel loses sight of one material fact in this case, and that is this: That the supervising engineers in this case were the agents, superintendents, representatives and vice principals of the Big Lost River Irrigation Company and had full power to represent their principal in the

interpretation of the plans and specifications, and in making alterations.

In this connection we wish to call the court's attention to the case of Thomas vs. Stewart, 132 N. Y., 580; 30 N. E., 577, in which Justice Vann says:

> "But the appellant insists that the architect had no right to substitute an inferior article without the consent of the owner, and the authorities support that position. Glacius v. Black, 50 N. T., 145; Bigler vs. Mayor, 9 Hun. 253. The court, however, found upon evidence that is not printed in the case, but which it is expressly stipulated proved the fact, 'that said Sahagian employed the said George Rayner as his architect and servant to superintend the work of erecting said house, and the doing of the work thereof, and the said Rayner did so superintend such work and the erection of such house.' The contract provided that all work was to be done to the satisfaction of the architect, and the owner told one of the contractors that everything was left with the architect. Inasmuch as Mr. Rayner was not only the architect, but was also the agent of the owner, and represented him in the erection of the building, we think that he had authority to consent to the substitution complained of. The fact that the change was made without the knowledge or consent of the owner, as found by the court, evidently means, when the context is considered, without his personal knowledge or consent."

See also Solomon vs. Vallette, 152 N. Y. 147; 46 N. E., 324;

Dunn vs. Steubing, 120 N. Y., 232; 24 N. E. 315;

Huber vs. St. Joseph Hospital, 11 Idaho, 631; 83 Pac. 768.

That the supervising engineer upon the ground was the agent, superintendent and vice principal of the Big Lost River Irrigation Company, it is only necessary to read the contract made between the Arnold Company and the Big Lost River Irrigation Company to arrive at this conclusion. In the forepart of this brief we have discussed a number of the terms of this contract.

We have made no claim and make no claim now that the certificates for work done issued to us by the engineers of the Big Lost River Irrigation Company are necessarily final or conclusive, but these certificates are prima facie evidence of the work done and the amount due, and unless the appellants' trustees have attacked these certificates as being wrong or were fraudulently issued or were issued under misapprehension of the facts then they are binding and conclusive.

Corey Bros. Construction Company in its bill of complaint alleged as follows:

> "Your orator further shows unto this honorable court that 90% of the cost of the materials furnished and work done should be

paid to it by the defendant Big Lost River Irrigation Company, on or before the 10th day of each calendar month, for all work done during the preceding calendar month, and that said payments should be made on the estimates of the engineer of the amount of work done and material furnished." (Rec. 5.)

"Your orator further shows until this honorable court that in pursuance of said contract of employment, it performed the following work: (enumerating it). Making a total of work done and material furnished of $1,215,015.14."

"Your orator further shows that all of said amounts are computed from the estimates made by the engineer in charge of said work." (Rec. 5, 6 and 7.)

Appellants' trustees in paragraph 4 of their answer referred to this allegation as follows:

"Further answering, these defendants say that they are not advised save by the allegations of said bill, as to what work, if any, has been done by the complainant upon account of the construction of any dam or canal for the Big Lost River Irrigation Company, nor as to what was the contract price or cash value of such work, if any, as has been done by said complainant; and these defendants pray that the said complainant may be required to make strict proof of each of the allegations of its bill of complaint in that behalf." (Rec. 50.)

This denial, if it is a good denial, put upon Corey Bros. Construction Company the burden of proving that such certificates were issued. The introduction of these certificates properly signed was prima facie evidence of the work done by Corey Bros. Construction Company upon this system, and these certificates issued by the agents and superintendents of the Big Lost River Irrigation Company to us are final and conclusive, unless the appellants' trustees have alleged something in their answer avoiding them, or have introduced proof to show that these certificates are wrong, and we respectfully submit to this honorable court that the appellants' trustees have not sought by any allegation in their answer or by any proof offered to impeach these certificates. That being so, they are final and conclusive.

On page 72 of appellants' brief counsel say:

> "It is admitted by complainant that the Irrigation Company long before this suit was brought or this lien claim filed it parted with its entire interest in this property, to the extent that it had mortgaged the property for more than its value."

Where counsel can find any such admission in the record on our part, is more than we can comprehend. We will admit, for the purpose of this argument, that with the system uncompleted, that it was not worth the amount of the mortgages. The record

does not show that the Big Lost River Irrigation Company has parted with all of its interest in the property.

It is true that on August 27, 1909, the Big Lost River Irrigation Company made and executed a trust deed to the defendant trustees to secure a mortgage of $2,000,000, and this trust deed was filed for record on the 3rd day of September, 1909.

We also admit that on January 1, 1910, the Big Lost River Irrigation Company made and executed its mortgage or trust deed to the appellants' trustees to secure bonds amounting to $400,000, and that said trust deed was afterwards filed for record.

By the giving of these trust deeds the defendant Big Lost River Irrigation Company did not part with the title to said property. It simply gave a lien to the appellants' trustees upon whatever property was described in the trust deed.

Section 3381 of the Political and Civil Code of the State of Idaho reads as follows:

> "Section 3381: Notwithstanding an agreement to the contrary a lien or a contract for a lien transfers no title to the property subject to the lien."

Section 3388 reads as follows:

> "Section 3388: Mortgage is a contract by which specific property is hypothecated for the performance of an act without the necessity of a change of possession."

The Supreme Court of the State of Idaho in the case of Brown vs. Bryan et al, 6 Idaho, 1, 51 Pac. 995, has held a trust deed given to secure a debt is a mortgage, although it contains a power of sale.

In concluding this part of our argument we wish again to call attention to one provision of the contract made between Corey Bros. Construction Company and the Big Lost River Irrigation Company.

On page 486 of the Record under paragraph 5, we find the following:

> "5. **Inspection.** The supervising engineer or his duly authorized assistants shall at all times have access to the work, which work is to be entirely under their control. Any material or construction which does not fully accord with the letter or the intent of these specifications may be condemned by the engineer or his representatives, and the contractor shall immediately rectify or replace such defective work without expense to the company."

Under the head of "Guarantees," on page 488, we find the following in this contract:

> "The contractor further guarantees all workmanship and all material furnished by him to be first class in every particular, and agrees to replace, free of cost to the company, any part or piece showing defects of such material or workmanship within a period of one year from the completion of the entire work, unless otherwise specified."

According to these two provisions it was incumbent upon the contractor Corey Bros. Construction Company to replace any workmanship that was inferior. The evidence shows conclusively and is uncontradicted that Corey Bros. Construction Company has never been asked to replace or rebuild any part of the work.

By the reading of this record it will be seen that there is a conflict of the evidence on questions of fact. This being so, it is a rule of this court and all federal appellate courts in general that unless manifest error has been committed by the lower court, the appellate court will not reverse findings of the lower court.

Provident L. & T. Co. vs. Camden & T. Co., 177 Fed. 862;
Warren vs. Keep, 155 U. S. 265;
Wilcox vs. Consolidated Gas Co., 212 U. S. 19;
Topliff vs. Topliff, 145 U. S. 156;
Harding vs. Hart, 113 Fed. 304;
Oteri vs. Scalzo, 145 U. S., 578, 579, 590.

II.

Replying to Appellants' Contention that Corey Bros. Construction Company Made This Contract and Entered Upon This Work Without Complying With the Foreign Corporation Laws of the State of Idaho.

At the time Corey Bros. Construction Company commenced this work the Big Lost River Irrigation Company had not been organized. That corporation

was not organized until the 15th day of June, 1909. It had no meeting of its board of directors until the middle of July, 1909. (Rec. 575.) So it was impossible for Corey Bros. Construction Company to make a contract with a corporation before it was organized.

It is true that the officers of Corey Bros. Construction Company had a talk with the promoters of the Big Lost River Irrigation Company before said company was organized, and it is true that the promoters of the Big Lost River Irrigation Company furnished to Corey Bros. Construction Company a form of contract which would be executed as soon as the Big Lost River Irrigation Company was incorporated.

This contract was not executed until August 26, 1909, and Corey Bros. Construction Company had fully complied with the laws of the State of Idaho with reference to foreign corporations doing business on the 5th day of August, 1909. So that it will be seen that before this written contract was entered into Corey Bros. Construction Company had fully complied with the laws of the State of Idaho with reference to a foreign corporation doing business in that state.

The Big Lost River Irrigation Company did not obtain a title to this property until after the 16th day of July, 1909. (Rec. 582-586.)

On August 21, 1909, the Board of Directors of the Big Lost River Irrigation Company passed a resolution authorizing the officers of the company to enter into a contract with Corey Bros. Construction Company. (Rec. 588.)

This contract that was signed on August 26, 1909, does not attempt to ratify or speak of any work that had been done by Corey Bros. Construction Company, but our contention is that the Big Lost River Irrigation Company ratified all the acts of its promoters by accepting the work done by Corey Bros. Construction Company.

Whitney vs. Wyman, 101 U. S., 392;
Rogers vs. New York Etc., Land Co., 134 N. Y., 197, 211;
Wilson vs. Kings etc. R. R., 114 N. Y., 487;
Stanton vs. N. Y. etc. R. R., 22 Atl. Rep. (Conn.), 300;
Davis vs Montgomery etc. Co., 8 So. Rep. (Ala.), 496;
Pittsburgh etc Co. vs. Quintrell, 20 S. W. (Tenn.), 248;
Wood vs. Whalen, 93 Ill., 153;
Paxton vs. First Nat. Bk., 21 Neb., 621.

There can be no doubt but what the Big Lost River Irrigation Company after it was organized could have repudiated any verbal understanding that the promoters had with Corey Bros. Construction Company, but the evidence in this case shows that

after the Big Lost River Irrigation Company was properly organized and Corey Bros. Construction Company had complied with the laws of the State of Idaho relative to foreign corporations doing business in that state, these two companies then entered into a contract, and the Big Lost River Irrigation Company, by accepting the work done by Corey Bros. Construction Company before the Big Lost River Irrigation Company was organized, ratified all that its promoters did in its behalf.

The appellants' trustees in this case are also estopped from denying that Corey Bros. Construction Company has a lien upon the said property, for the uncontradicted evidence shows that this property, before Corey Bros. Construction Company did any work upon it, was practically valueless, and it is Corey Bros. Construction Company's work that has added value, if any value there is, to the property, which would be a benefit to the bondholders.

Bear Lake Irrigation Co. vs. Garland, 164 U. S., 1-20.

Again, the laws of the State of Idaho do not make any contract entered into with a foreign corporation within the State of Idaho void which has not complied with the statute by filing its articles.

Section 2792 of the State of Idaho in reference to foreign corporations reads as follows:

> "No contract or agreement made in the name of, or for the use or benefit of, such corporation prior to the making of such filings as first herein provided, can be sued upon or enforced in any court of this state by such corporation."

It has been held practically without contradiction, that a state statute which merely closes the courts of the state to a foreign corporation which has not complied with the condition of doing business within the state without expressly or constructively declaring the contract itself void, does not prevent the maintenance of an action in a federal court siting in that state by such a foreign corporation, upon a contract within the state.

Barlin vs. Bank of British N. A., 50 Fed., 260;
Sullivan vs. Beck, 76 Fed., 200;
Blodgett vs. Lanyon Zinc. Co., 120 Fed., 893;
Groton Bridge & Mfg. Co. vs. American Bridge Co., 151 Fed., 871;
Dunlop vs. Mercer, 156 Fed., 545;
Vitagraph Co. vs. Twentieth Century Optiscope Co., 157 Fed., 699;
Johnson vs. New York Breweries Co., 178
David Lupton's Sons Co. vs. Automobile Club,
Allen vs. Alleghany Co., 196 U. S., 458;
Fed., 513:
225 U. S., 489.

The case of Barling vs. Bank of British North America, supra, was a case decided by this Honorable

Court, and District Judge Deady speaking for the court said:

> "The defendant Eva interposed a plea in abatement, to the effect that the plaintiff could not maintain the action, because it had failed to file the statements concerning its business, required by the California act of April 1, 1876, entitled 'An act concerning corporations and persons engaged in the business of banking,' which provides that no corporation or person 'who shall fail to comply with the provisions of this law shall maintain or prosecute any action or proceeding in any of the courts of this state, to which plea the plaintiff demurred, and the court sustained the demurrer. 44 Fed. Rep. 641.
>
> "In this there was no error. The statute only prohibits an action in the courts of the state. Neither does it prohibit the transaction of banking business in the state, but simply provides that the parties failing to file the required statement shall be denied access to the courts of the state. Nor is it in the power of the state legislature to prohibit the plaintiff from maintaining an action in this court if it would.
>
> "While it is admitted that such legislature may limit the right or capacity of a foreign corporation to do business or acquire property within the limits of the state absolutely, or except upon compliance with conditions precedent thereto, it is well established that it cannot in any way limit or restrain the jurisdiction of the national courts. Bank vs. Travel, 7 Fed. Rep. 146; Phelps vs. O'Brien Co., 2

Dill. 518; Railroad Co. vs. Whitton, 13 Wall. 270."

The case of David Lupton's Sons Co. vs. Automobile Club, supra, was a case where a corporation organized under the laws of the State of Pennsylvania sued to recover on a contract and for work done in the State of New York, said corporation not having complied with the state laws of New York, and the Supreme Court of the United States, speaking through Mr. Justice Hughes, said:

> Under section 15 of the general corporation law of the State of New York a foreign stock corporation, other than a moneyed corporation, is prohibited from doing business in the state without having first procured from the secretary of state a certificate that it has complied with certain prescribed conditions. The corporation is required (section 16) to file with the secretary of state a sworn copy of its charter and a statement setting forth the business which it proposes to carry on in the state; to designate its principal place of business within the state, and to appoint a person upon whom legal process may be served.' Wood & Selick vs. Ball, 190 N. Y., 217, 224; 83 N. E. 21. Section 15 provides: 'No foreign stock corporation doing business in this state shall maintain any action in this state upon any contract made by it in this state unless, prior to the making of such contract, it shall have procured such certificate." In his original

report, the referee found that the Lupton Company was doing business in the state of New York, within the meaning of the statute, without a certificate of authority; and after the report was recommitted, he made additional findings with respect to the nature of its business, upon which the plaintiff in error bases its contention that the statute has been held to apply to transactions in interstate commerce which were not subject to the state's interdiction. It is not necessary, however, to review these findings, for the statute has received a construction by the highest court of the state of New York which precludes it, in any aspect of the case, from being regarded as a bar to the maintenance of this action.

"The referee's ruling that the contract was void was based upon the statement in the opinion in Wood & Selick vs. Mall, supra, that 'the procuring of a license must precede the transaction of business, or the contracts of the corporation are not lawful.' But in Maher vs. Harrington Park Villa Sites, 204 N. Y. 231,— L. R. A. (N. S.)——, 97 N. E. 587, the court of appeals of New York has declared that a contract made by a foreign corporation doing business within the state without certificate of authority is not absolutely void; that the only penalty prescribed by the general corporation law for a disregard of the provisions of section 15 is a disability to sue upon such a contract in the courts of New York; and that the contract remains valid and effective in all other respects.

In the Mahar case, the action was brought to recover a sum deposited under a contract made in New York with the defendant, a foreign corporation, which it was alleged was transacting business in the state without authority at the time the contract was made. It was asserted, in support of the action, that the contract was void, and hence that there was a failure of consideration. The court of appeals held that the complaint did not state a cause of action. In the opinion delivered by Willard Bartlett, J., in which the majority of the court concurred, it is said:

" 'It is assumed in the prevailing opinion' (that is, the opinion below, 146 App. Div. 756, 131 N. Y. Supp. 514) 'that this court held in the case of Wood & Selick vs. Ball, 190 N. Y. 217, 83 N. E. 21, that noncompliance with the requirements of that section has the effect of rendering any contracts made by such a corporation in this state absolutely void. Such is not my understanding of the purport of that decision. The only proposition decided in that case was 'that compliance with section 15 of the general corporation law should be alleged and proved by a foreign corporation such as the plaintiff in order to establish a cause of action in the courts of this state.

* * * "The only penalty which the general corporation law itself prescribes for a disregard of the provisions of this section is a disability to sue upon such a contract in the

courts of New York. 'No foreign stock corporation doing business in this state shall maintain any action in this state upon any contract made by it in this state, unless, prior to the making of such contract, it shall have procured such certificate.' Consol. Laws, chap 23, sec. 15. This prohibition would be effective to prevent the appellant from suing the respondent upon the contract alleged in the complaint: but in my opinion it is not operative to wholly invalidate the contract. I think that the penalty imposed upon a foreign stock corporation for doing business in New York, without the certificate of authority required by section 15 of the general corporation law is limited to that prescribed in the section itself. No doubt the legislature could have gone further and declared all contracts to be void which were made by a foreign stock corporation doing business in this state without having obtained the certificate; but it has not done so. This was the view taken in J. R. Asling Co. vs. New England Quartz & Spar. Co., 66 App. Div. 473, 72 N. Y. Supp. 347, affirmed in 174 N. Y. 536, 66 N. E. 1110, where it was held that section 15 did not prevent a foreign stock corporaton doing business here without having procured the necessary certificate from recovering upon a counter-claim growing out of the transaction upon which the plaintiff sued. 'The defendant, having been brought into court, and thus made to defend,' said Mr. Justice O'Brien in that case, 'should be allowed,

> unless there is a distinct provision to the contrary, not only to defend, but also to litigate, any question arising out of the transaction that has been made the basis of the plaintiff's complaint. There is no such prohibitive provision in this statute, and therefore the obtaining of the certificate would not be a prerequisite to a recovery upon the counter-claim in question.' (P. 476.) The Supreme Court of the United States has distinctly held that a contract made by a foreign corporation with a citizen of another state is not necessarily void because the corporation had not complied with the laws of such other state, imposing conditions upon it as a prerequisite to the lawful transaction of business therein."

By a reading of the decisions of the Supreme Supreme Court of the State of Idaho it will be seen that the court has held that contracts entered into by foreign corporations before such foreign corporation has complied with the statute in reference to doing business in that state are not void or invalid.

In the case of Colby vs. Cleaver, 169 Fed., 207, Judge Dietrich of the Federal Court of Idaho in speaking of this statute relating to foreign corporation doing business in that state before it had filed its articles of incorporation said:

> "It is clear that the legislature did not intend that such contracts or agreements should be absolutely void; otherwise, they

would have placed them in the same category with conveyances of realty. That they are not void is the settled doctrine of the Supreme Court of the state. Valley Lumber & Mfg. Co. vs. Nickerson et al., 13 Idaho, 682, 93 Pac. 24; Valley Lumber & Mfg. Co. vs. Driessel, 13 Idaho, 662, 93 Pac., 765, 15 L. R. A. (N. S.) 299. Moreover, it is equally clear that it was not the intention of the legislature to declare them unenforceable against the corporation. The real question is whether such a contract is ever or at all enforceable by or upon behalf of such corporation. The Supreme Court of the state has, in effect, held that it is not a lifeless thing. that the provisions thereof in favor of the corporation are not void, but that, when such contract is sued upon in a state court by the corporation, it shall be just as available to the corporation as it would be had the corporation not been in default at the time of the execution of the contract, unless the defendant, seasonably and in an appropriate manner, makes objection upon the statutory ground. See Valley Lumber & Mfg. Co. vs. Nickerson and Valley Lumber & Mfg. Co. vs. Driessel cited supra.

"If this view be correct. then such a contract or agreement is a subsisting and binding obligation, not only of the corporation, but of both parties thereto: for, if the undertaking of the one part were lifeless, his failure to raise objection could not operate to breathe life into that which was never animate. The point of

pleading and practice thus settled in the state courts is not in question here, for the defendant has raised timely objection; but I have directed attention to this view of the Idaho court for the purpose of more clearly fixing and defining the status of such a contract. If the legislature had declared such contract, or the portions thereof in favor of the defaulting corporation, to be void, or if it were provided that such contract is not enforceable by or on behalf of such corporation or its assignee, there would be no room for doubt as to the legislative intent; but the provision is that such a contract cannot be enforced in any court of this state.' In interpreting a statute, it is generally the duty of the court to give each of its several clauses and phrases some meaning. The exceptions to the rule are rare. The phrase 'of this state' does not inject into the enactment either conflict or ambiguity; nor, if retained, is it materially at variance with the remedial purpose of the legislation, and I am unable to discern any valid reason for rejecting it. What significance did the legislature attach to it? If it is to be given any meaning at all, it must be one of limitation. If it was the intention of legislature to provide that such a contract should not be enforceable in any court, why was not the phrase 'of this state' omitted? Apt phraseology to express the idea of absolute nonenforceability readily suggests itself, and it is impossible to avoid the conclusion that it was not the intention to de-

> clare such a contract wholly unenforceable, but only to deny to the delinquent corporation certain means of enforcement. In other words, the state legislature intended that the doors of the state tribunals should be closed against a foreign corporation which had transacted business in the state in violation of the state laws. If this view be correct, the clause does not, by its terms, embrace federal courts."

In the case at bar the record shows that as soon as Corey Bros. Construction Company had a verbal understanding with the promoters of the Big Lost River Irrigation Company about doing this work on the canal system that it immediately proceeded to file its articles with the County Recorder of Custer County, and did file such articles in July, 1909, and on August 5, 1909, filed another certified copy of its articles from the recorder of Custer County with the Secretary of State, and on said day the Secretary of State issued to Corey Bros. Construction Company a certificate stating that Corey Bros. Construction Company was authorized to do business in the State of Idaho, and that it had complied with the laws and constitution of the State of Idaho relative to foreign corporations doing business in that state. So that before any legal contract was entered into between Corey Bros. Construction Company and the Big Lost River Irrigation Company, Corey Bros. Construc-

tion Company had fully complied with the law relating to foreign corporations.

The rule invoked by appellants' counsel is a very harsh and unnatural construction to give to the Idaho statute, and we believe that a careful perusal of the decisions of the Supreme Court of the State of Idaho will show that the court has never intended to declare all contracts made by foreign corporations before said corporations have complied with the law to be void or invalid.

III.

Replying to Appllants' Brief That District Court was Without Jurisdiction.

Corey Bros. Construction Company, a corporation of Utah, and a resident and citizen of Utah, filed its bill to foreclose its mechanic's lien in the Circuit Court of the United States for the District of Idaho at Boise on the 15th day of October, 1910, and made as parties defendant the Big Lost River Irrigation Co., a corporation of Idaho, and a resident and citizen of Idaho, and the American Trust & Savings Bank (now the Continental and Commercial Trust and Savings Bank), a corporation of Illinois, and a resident and citizen of Illinois, and Frank H. Jones, a resident and citizen of Illinois, parties defendant. The amount sought to be recovered was over $500,-

000, and the property sought to be foreclosed under the mechanic's lien was in the State of Idaho. These allegations show the requisite citizenship and the amount involved to be sufficient to give the United States Circuit Court jurisdiction.

On the 22nd day of October, 1910, the Union Portland Cement Company, a corporation of Utah, and a resident and citizen of Utah, commenced a separate action in the same court and against the same parties defendant to foreclose its mechanic's lien for the sum of about $14,000.

On the 27th day of November, 1910, Corey Bros. Construction Company filed an amended bill making new parties defendant, and among these new parties defendant was included the Union Portland Cement Company, a resident and citizen of Utah, and other parties who were residents of Utah and Idaho.

On the 21st day of January, 1911, before any of the parties defendant had plead to Corey Bros. amended bill, on motion of the solicitor for Corey Bros. Construction Company the Union Portland Cement Company and all the other parties defendant who were residents of Utah were dismissed.

On the 29th day of May, 1911, on motion of Corey Bros. Construction Company and on notice to all the parties defendant, the judge of the District Court appointed a receiver of all the property of the Big Lost River Irrigation Company. Said receiver qualified

and took possession of all of said property, and is now in possession of all of the property. Appellants' trustees and the Big Lost River Irrigation Company consented to the appointment of this receiver.

After this property was in custodia legis, the Union Portland Cement Company intervened in the Corey Bros. Construction Company case to foreclose its mechanic's lien. Answers were filed by all of the defendants and the issues were made up. Evidence was taken and the lower court entered judgment in favor of Corey Bros. Construction Company and Union Portland Cement Company against the Big Lost River Irrigation Company and declared said judgments to be a prior claim over the mortgage of the appellants' trustees and over the claims of the other defendants.

No special plea was interposed by the appellants' trustees in the lower court that there were other, necessary or indispensable parties who should be made either plaintiffs or defendants in said action.

Appellants then were well acquainted with the facts when they filed their answer as they were later on in the case.

Counsel for appellants have sought to give a forced, unnatural and strained construction to one of the provisions of the Idaho statute relating to mechanic's liens, and unless this section of the statute upholds their claim, they must fail in their conten-

tion that the lower court had no jurisdiction.

Section 5120 of the Civil Code of Procedure of the State of Idaho reads as follows:

> "Section 5120. In every case in which different liens are asserted against any property, the court in the judgment must declare the rank of each lien or class of liens which shall be in the following order." (Setting out priorities.)

That is to say, that when there are several parties plaintiff and defendant who are asserting different liens to the same property in the same suit, then the court in rendering judgment must declare priorities of said liens as pointed out by the statute. These priorities can only be determined by the parties **who are asserting** their liens, either by way of complaint, cross-complaint or counter-claim. There might be a party defendant who had a lien, yet if he did not assert it then, it would not be incumbent upon the court to determine his priority, if he had any.

There is nothing in the code or statutes of Idaho that says that a lien claimant cannot sue the original owner without joining all others who may have liens or claims against the property involved. In fact the statute of Idaho expressly declares to the contrary.

Section 5121 of the Civil Code of Procedure of Idaho reads as follows:

> "Section 5121. Any number of persons

> claiming liens against the same property may join in the same action, and when separate actions are commenced the court may consolidate them. The court shall also allow as part of the costs the moneys paid for filing and recording the claim, and reasonable attorneys' fees."

Under the foregoing statute any number of lien claimants may join as plaintiffs or any one may sue the owner and assert his claim, and if they are different suits, the court may consolidate them or he may not consolidate them.

It has always been a rule of procedure for a court of equity in its judgment to determine the priorities of conflicting claimants, and courts of equity, when it can be done, will consolidate different causes of action that affect the same property, and will render a decree that will do justice to all the parties as their claims may appear before it.

What have been rules of equity for courts to follow, Idaho has simply by the two foregoing provisions enacted into a statute. Federal courts sitting in equity have been governed by these rules.

It has also been the rule of federal courts sitting in equity, upon a proper application of either plaintiff or defendant, to make other parties defendant, if it can be done without ousting the court of its jurisdiction to hear and determine the case. Federal courts

will not make proper or necessary parties defendants unless they are indispensable, when such joinder will oust the court of jurisdiction. If the court finds that a party is an indispensable one and by joining such party as defendant would oust the court of jurisdiction, then the court will dismiss the whole action. So the question reverts back to the proposition whether the Union Portland Cement Company was an indispensable party.

Corey Bros. Construction Company had no claim against the Union Portland Cement Company. Its claim was against the Big Lost River Irrigation Company, and to secure that claim it filed its mechanic's lien, and it could sue the Big Lost River Irrigation Company to enforce that mechanic's lien without joining any of the other parties as defendant, and if it should obtain judgment against the Big Lost River Irrigation Company, it could sell out all the interests of the Big Lost River Irrigation Company, but the other lien claimants who were not made parties would not be affected by that decree.

It has been the practice in federal courts and in state courts all over the United States for one mortgagee to commence an action against the mortgagor to foreclose his mortgage, and it is not necessary to make prior or subsequent mortgagees parties defendant, and it has been the rule in federal courts and in state courts for a lien claimant to sue the owner and

not join with any other lien claimant. The joining of other lien claimants is only for the purpose of quieting title, and it is always at the option of the plaintiff whether he will join or not join as party defendants other claimants.

It is our contention that the appellants' trustee having not raised by special plea that the Union Portland Cement Company was a necessary party, that this court and the lower court are bound by the allegations of plaintiffs' complaint, and this complaint showing the requisite diversity of citizenship, that the lower court had jurisdiction, unless the court should be of the opinion that the Union Portland Cement Company was an indispensable party.

In the case of Butchers' & Drovers' Stockyards Co. vs. Louisville & N. R. Co., 67 Fed., 40, Judge Taft says:

> "We think a liberal construction of the bill must be given to sustain the jurisdiction of the court at this time, in view of the fact that no plea to the jurisdiction was made below, and no question of the jurisdiction seems there to have been raised. But it is said that the averment to be jurisdictional amount is denied by the answer, and is not sustained by any proof. It was decided in Wickliffe vs. Owens, 17 How 17, that where a bill in chancery avers that the defendant is a citizen of another state, this averment can only be impugned in a special plea to the jurisdiction of the court, and

that the answer is not a proper place for it, under the thirty-third equity rule governing the practice in the federal courts. By pleading to the merits, the defendant admits the averments in the bill which state facts sufficient to establish the jurisdiction of the court. Sheppard vs. Graves, 14 How. 505; De Sobry vs. Nicholson, 3 Wall. 420. The objection to the jurisdiction of the circuit court, therefore, is not sustained."

In the case of Crown Cork & Seal Co. vs. Standard Brewery, 174 Fed., 253, Judge Sanborn said:

"Complainant is alleged to be a Maryland corporation, and a citizen of that state, and defendants citizens of Illinois, and residents of the district where suit was brought, and the matter in dispute is averred to be $50,000 in each case. The citizenship of defendants and amount in dispute are admitted by failure to deny, but the answers deny the citizenship of complainant. However, there was no plea to the jurisdiction, so that in equity it stands admitted, whatever the rule may be at law. Butchers' & Drovers' Stockyards Co. vs. Louisville & Nashville, R. Co., 67 Fed. 35, 14 C. C. A. 290, 31 U. S. App. 252; Roberts vs. Lewis, 144 U. S. 653, 12 Sup. Ct. 781, 36 L. Ed. 579.

Counsel for appellants in their brief at page 109 have quoted quite extensively from the case of Gray

vs. Havemeyer, 53 Fed., 174. That was a case of a foreclosure of a mortgage in which other mortgagees and various lien claimants were made parties defendant. The lower court entered a decree that the mortgages were prior liens over the lien holders, except as to one lien holder, who was entitled to $12.00 preference. One of the lien holders defendant appealed from this judgment and failed to cite all the other lien holders into the appellate court, and the appellate court said that it could not disturb the judgment, for the reason that all the parties interested in the judgment were not before that court.

That is the general rule of all appellate federal courts, that where the judgment is joint or several, in order to review the judgment as between all the parties, all the parties must be cited into the appellate court, and if the judgment is joint and relates to real estate, that a failure to cite said parties will be a cause for dismissal of the case.

The case of Gray vs. Havemeyer was decided by the Eighth Circuit Court of Appeals.

In the case of Faulkner vs. Hutchins, 226 Fed., 362, the court cites the case of Gray vs. Havemeyer, and in its percuriam opinion says:

> "The decree in this case was against R. B. Faulkner, Fayette Owens, Jim Bends, Minnie Owens, and John Crisp for possession of real estate and against R. B. Faulkner, George W.

Holder, M. W. Riley, M. L. Powers, J. T. Jack, and John Draughon for $560. The appeal was taken by R. B. Faulkner alone from this joint decree, and there is no evidence in the record of any summons and severance or of any notice to the other defendants to participate in the appeal. A separate appeal by a single party from a joint decree against him and others cannot be maintained without notice to the other defendants. For this reason the decree of the Court of Appeals of the Indian Territory, which dismissed the appeal was right, and it is affirmed. Masterson vs. Herndon, 10 Wall, 416, 19 L. Ed. 953; Hardee vs. Wilson, 146 U. S. 179, 181, 13 Sup. Ct. 39, 36 L. Ed. 933; Davis vs. Trust Co., 152 U. S. 590, 14 Sup. Ct. 693, 38 L. Ed. 563; Gray vs. Havemeyer, 3 C. C. A. 497, 505, 53 Fed. 174, 178; Farmers' Loan & Trust Co. vs. McClure, 78 Fed. 211, 212, 24 C. C. A. 66, 67; Dodson vs. Fletcher, 78 Fed. 214, 215, 24 C. C. A. 69, 70.

In the case of Lewis vs. Sittel, 165 Fed., 157, Judge Sanborn again refers to the case of Gray vs. Havemeyer.

In this case Judge Sanborn holds that it cannot review the judgment of the lower court in order to reverse it, for the reason that all the necessary parties who were defendants in the lower court had not been cited, and for this reason affirms the judgment of the lower court.

On the question of indispensable parties, the jurisdiction of the Federal Court, rearrangement of parties plaintiff and defendant in the Federal Court and other questions pertinent to the questions already argued, we cite the court to the following cases:

Shulthis vs. McDougal, 225 U. S., 561;
Helm vs. Zarecor, 222 U. S., 32;
Shields vs. Barrow, 17 How. (58 U. S.) 130;
Armstrong Cork Co. vs. Merchants' Refrigerating Co., 184 Fed., 199;
Pacific R. R. vs. Ketchum, 101 U. S. 298;
Compton vs. Jessop, 68 Fed., 279;
Wolterman vs. Canal-Louisiana Bank, 215 U. S., 33;
Wabash Railroad vs. Adelbert College, 208 U. S., 54;
Heidritter vs. Oil Cloth Co., 112 U. S., 294;
Newton vs. Gage, 155 Fed., 604;
People's Sav. Inst. vs. Miles, 76 Fed., 252;
National Bank vs. Allen, 90 Fed., 545;
Simpson, Federal Equity Suit, pages 494 to 495;
Farmers' Loan & Trust Co. vs. Lake Street Ry. Co., 177 U. S., 51;
182 U. S., 417;
Morgan vs. Texas Ry. Co., 137 U. S., 201.

The petition in intervention of the Union Portland Cement Company stated that there was no controversy existing between it and Corey Bros. Construction Co. Counsel for Corey Bros. Construction

Company and Union Portland Cement Company stated in open court that there was no controversy existing between these two parties, and that neither one claimed preference over the other, and counsel now makes that same statement to this court.

IV.

Replying to Appellants' Brief that Corey Bros. Construction Company is Estopped to Assert a Lien Superior to That of the Trust Deed.

W. W. Corey, president and general manager of Corey Bros. Construction Company, testified that he did not know that there was any trust deed or any bonds issued under a trust deed until March, 1910. George S. Speer contradicts Mr. Corey.

Mr. Speer further testified that he first met Corey in Denver while Corey was over there bidding on a project, which was in the spring of 1909. Corey denies that he was in Denver bidding on a proposition in the year 1909, but that he did bid on some work in 1910. Corey's testimony in this respect is corroborated by plaintiffs' Exhibit No. 94, which is a letter from Trowbridge & Niver signed by George S. Speer as vice president, and which letter is dated March 12, 1910. In this letter Mr. Speer informs Mr. Corey that there was another bidder cheaper than Corey's bid for the work to be done. (Rec. 554.)

There is no contention made that Corey Bros. Construction Company agreed not to claim a lien or file a lien or that its claim would be waived in favor of any subsequent mortgage, and there is not one scintilla of evidence that Corey Bros. Construction Company or any of its officers ever induced any person to buy a bond that was issued upon this project, and there is no evidence in the record whatever that there is an innocent purchaser of these bonds. Probably counsel for appellants, when they were speaking about innocent purchasers, referred to Trowbridge & Niver and George S. Speer, for it appears in this record that these parties have converted 200,000 of these bonds to their own use. (Rec. 355.)

Section 5114 of the Statute of Idaho reads as follows:

> "Section 5114: The liens provided for in this chapter are preferred to any lien, mortgage or other incumbrance, which may have attached subsequent to the time when the building, improvement or structure was commenced, work done, or materials were commenced to be furnished; also to any lien, mortgage, or other incumbrance, of which the lien holder had no notice, and which was unrecorded at the time the building, improvement or structure was commenced, work done, or the materials were commenced to be furnished."

The first part of this statute provides that "me-

chanic's liens are preferred to any lien, mortgage or other incumbrance, which may have attached subsequent to the time when the building, improvement or structure was commenced."

Corey Bros. Construction Company's contract was signed on August 26, 1909. It had already commenced work under its contract, and defendants' trustees' first mortgage was not acknowledged until August 27, 1909, and was not filed for record until September 3, 1909, so according to the express terms of this statute Corey Bros. Construction Company's mechanic's lien is superior to defendants' trustees' several trust deeds, for the reason that these trust deeds were not made or filed for record until after Corey Bros. Construction Company's contract was signed and Corey Bros. Construction Company had actually commenced work. Our contention is that Corey Bros. Construction Company's lien would attach even if Corey Bros. Construction Company knew that it was the intention of the Big Lost River Irrigation Company to subsequently mortgage this property, upon the principle "he who is prior in time is stronger in right."

Where the statute expressly states who shall be prior in time, a court of equity can not change this rule, notwithstanding a hardship may be worked upon some party, unless fraud is involved and there is no intimation in this record that Corey Bros. were

guilty of any deception or fraud of any kind.

We were working upon this project when this mortgage was made and executed, which was notice to the trustees and the bondholders that the party who was doing this work might claim a lien for that work.

Garland vs. Bear Lake & Irrigation Co., 164 U. S., 1-20.

Bloom on Mechanics' Lien, Par. 487.

Mine & Smelter Supply Co. vs. Idaho Consolidated Mines Co. (Idaho), 118 Pac. Rep. 301.

Iowa Mortgage Co. vs. Shanquest, 70 Iowa, 124.

Germania B. & L. Association vs. Wagner, 61 Cal., 349.

In the case of Garland vs. Bear Lake & Irrigation Company the Supreme Court held that a contractor who went upon the public lands and constructed a ditch had a lien for work done prior to a mortgage that was already of record when the work was commenced.

V.

Replying to Plaintiffs' Brief That Irrigation Works Constructed Under the Carey Acts Are Not Subject to a Mechanic's Lien.

The Supreme Court of the State of Idaho has

held that a mechanic's lien does attach to a project of this kind. That decision was rendered on January 4, 1908.

There have been three sessions of the legislature of the state of Idaho since that decision was rendered by the Supreme Court, and not one of these legislatures has seen fit to change this rule of law as announced by the Supreme Court.

Nelson Bennett Co. et al vs. Twin Falls Land & Water Co., 14 Idaho, 5; 93 Pac., 789.

In 1912 the Supreme Court of Idaho again rendered another decision affirming this same proposition.

Hill vs. Twin Falls & Salmon R. L. & W. Co., 125 Pac., 204.

The construction of this statute by the Supreme Court of Idaho is binding upon this court.

Martin vs. West, 222 U. S., 191.

Mathias Schmidinger vs. City of Chicago, decided by the Supreme Court of the United States on January 13, 1913, 33 Sup. Ct. Rep. 182.

For other authorities upon mechanics' liens see:

Brooks vs. Railway Co., 101 U. S., 443.

Meyer vs. Hornby, 101 U. S., 730.

Ban vs. Columbia Southern R. R. Co., 117 Fed., 25.

The case of Meyer vs. Hornby, supra, is a good case on the question of estoppel, one of the questions raised by appellants' brief.

The case of Ban vs. Columbia Southern Railway Company, supra, is a case decided by this court in which Judge Hawley wrote the opinion. This case is instructive on a number of the errors relied upon by appellants in their brief.

At this time we wish again to call the attention of this court to the fact that the appellants' trustees did not ask for any affirmative relief in the court below. They have filed no cross-bill, and therefore a great many questions that they ask this court to decide are not in issue.

The court below did not give us any lien upon the settlers' contracts, and if it had attempted to render any decisions concerning these settlers' contracts, it would have been a mooted question for the court to decide.

If counsel had wished these questions to have been decided, it should have raised that issue by a cross-complaint.

Affirmative relief in an answer must be set up in a cross-bill.

Hill vs. Ryan Grocery Co., 78 Fed., 21.

Chapin vs. Walker, 175 Fed., 6.

The making of the Lost River Water Company

a party to this suit cannot be raised at this time, for the reason that no plea of necessary parties has been filed raising this question.

The Lost River Water Company is an Idaho corporation and by making that company a party defendant would not have ousted the Federal Court of jurisdiction.

VI.

Replying to Appellants' Contention That Under the Laws of Idaho Irrigation Companies May Sell Water Rights Free and Clear of Existing Incumbrances on the System.

If that proposition is true the purchasers of water contracts have not been injured. Neither have appellants' trustees.

VII.

Replying to Appellants' Contention That the Contract Between the State of Idaho and the Big Lost River Irrigation Company Dated May 27, 1909, is Not Assignable Without the Consent of the State.

This question is not raised by the pleadings, and is not properly before this court for decision.

The state of Idaho is not a party to this suit and will not be injured by any decree that the court has entered.

Query: What would the appellants' trustees contend if they were foreclosing their trust deeds?

VIII.

Replying to Appellants' Contention that the Irrigation System Cannot Be Sold Without the Right of Redemption.

At first blush it would seem that the lower court in decreeing that the property of the Big Lost River Irrigation Company should be sold as a whole and without the right of redemption was error.

This contract that the Big Lost River Irrigation Company had with the state of Idaho is in the nature of a franchise, a right or privilege to enter upon public lands to construct a reservoir and canal system, and to irrigate about 100,000 acres of land. The reservoir and the canals and the water should be considered as an integer; that is to say, the taking away of any one part makes the whole valueless.

The only real estate described in this decree is found on page 667 of the record. All of this real estate, when the reservoir is completed and filled with water, would be covered over with water. Testimony of Goyne Drummond, page 184. This also appears from the affirmative allegations in appellants' answer, found on page 52 of the Record. So that the use of this real estate is of the same kind and nature as the real estate upon which the canals are located;

the only difference being the canals are used as conduits for the conveyance of water and the reservoir is used as a receptacle for the holding of water.

This contract should have been completed on or before April 30, 1912. (Rec. 477.)

On account of the insolvency of the Big Lost River Irrigation Company and the subsequent litigation involving this property, nothing has been done with it, and it remains in the same condition as it did when Corey Bros. Construction Company stopped work.

It would be absolutely impossible to sell this system in parts, and it is very doubtful if the system would bring very much under a foreclosure sale if the right of redemption should be allowed.

The lower court has rendered no opinion upon this question. This question was discussed before the lower court after he had rendered his opinion, and his opinion in respect to this phase of the case was orally rendered, and that is the reason why it does not appear in this record.

Counsel for appellants resisted vigorously this part of the decree, but the court was of the opinion upon the authorities cited by appellees' counsel that the interest of all parties and the public would be best subserved in selling this property to cut off the equity of redemption.

Hammock vs. Loan & Trust Co., 105 U. S., 77;

Farmers' Loan & Trust Company vs. Iowa Water Co., 78 Fed., 881;

Pacific Northwestern Packing Co. vs. Allen, 116 Fed., 312;

Central Trust Co. vs. Sheffield, etc., Ry., 60 Fed., 17;

Columbia Finance & Trust Co. vs. Kentucky Union Ry., 60 Fed., 799;

American Loan & Trust Co. vs. Union Depot Co., 80 Fed., 40;

Sioux City Terminal R. & Co. vs. Trust Co., 82 Fed., 137;

National Foundry Co. vs. Oconto Water Co., 52 Fed., 45-59; which was affirmed by the Circuit Court of Appeals in 59 Fed., 20;

McKensie vs. Water Co., 6 N. D., 380; 71 N. W., 614;

Ten Eyck vs. Pontiac, 114 Mich., 500; 72 N. W., 364;

McFadden vs. Mays Landing R. R., 49 N. J. Equity 191; 22 At. 937;

Seibert vs. Minneapolis, etc., Ry., 58 Minn., 67; 59 N. W., 827.

The case of National Foundry & Pipe Works vs. Oconto Water Company, 52 Fed. 43, was decided by District Judge Jenkins. This opinion was affirmed by the 7th Circuit Court of Appeals in a per curiam opinion, and the judges said: "We concur in the opinion and conclusion of the Circuit Court as reported in 52 Fed., 43. The decree below is therefore affirmed."

We desire to call the court's special attention to this opinion of Judge Jenkins, for the reason that it relates to mechanics' liens, statutory construction and what property is subject to mechanics' liens.

IX.

HAS THIS COURT JURISDICTION TO HEAR AND DETERMINE THIS CASE UPON ITS MERITS OR TO REVERSE THE SAME AS BETWNEEN COREY BROS. CONSTRUCTION COMPANY AND UNION PORTLAND CEMENT COMPANY AND THE BIG LOST RIVER IRRIGATION COMPANY, THOUGH MANIFEST ERROR HAS BEEN COMMITTED?

Though we have argued this case somewhat at length on behalf of the appellees, Corey Bros. Construction Company and Union Portland Cement Company, yet we do not intend by this argument to waive the question that this court has no jurisdiction to hear or determine this case or to reverse the judgment and decree in behalf of Corey Bros. Construction Company and Union Portland Cement Company against the Big Lost River Irrigation Company, for the reason that neither the Big Lost River Irrigation Company or the other defendants named in said decree, except the Continental and Commercial Trust

and Savings Bank, a corporation, and Frank H. Jones, are before this court.

On the 27th day of December, 1912, the lower court entered judgment and final decree in behalf of Corey Bros. Construction Company and the Union Portland Cement Company, intervenor, and against the Big Lost River Irrigation Company, the Continental and Commercial Trust and Savings Bank, a corporation (formerly the American Trust and Savings Bank, a corporation), Nephi Hansen and others as defendants. (Record pages 665 to 679.) This decree was in favor of Corey Bros. Construction Company in the sum of $625,444.03, and also in favor of the Union Portland Cement Company in the sum of $17,054.40 and $500.00 costs against the Big Lost River Irrigation Company, and adjudged said sums to be a lien upon said property described in said decree, and that said sums of money were superior to the mortgage liens of the Continental and Commercial Trust and Savings Bank, a corporation, and Frank H. Jones, as Trustees, and any other liens that the balance of the defendants might have who are named in said decree. (Rec. 665.)

On March 26, 1913, the defendants, the Continental and Commercial Trust and Savings Bank, a corporation, and Frank H. Jones, trustees, filed their petition for appeal, which appeal on the same day

was allowed by the judge of the lower court. (Rec. pages 679-680.)

On the same day the Continental and Commercial Trust and Savings Bank, a corporation, and Frank H. Jones filed and served their assignments of error upon counsel for Corey Bros. Construction Company and the Union Portland Cement Company. (Rec. pages 681 to 690.)

On the same day said trustees as appellants gave a written undertaking to Corey Bros. Construction Company and the Union Portland Cement Company for $500.00, which undertaking was approved and filed on March 26, 1913. (Rec. pages 690 to 692.)

On said March 26, 1913, the court issued a citation directed to Corey Bros. Construction Company and the Union Portland Cement Company, which citation was served on the same day on counsel for Corey Bros. Construction Company and Union Portland Cement Company.

So it appears from the record in this court that the only parties who are properly before this court are the Continental and Commercial Trust and Savings Bank and Frank H. Jones as appellants and Corey Bros. Construction Company and Union Portland Cement Company as appellees. The Big Lost River Irrigation Company, the principal defendant, and James E. Clinton, Receiver of said company, and the other defendants are not before this court.

This case was tried at Boise City in the state of Idaho and was commenced and tried in what is known as the Central Division for hearing and trying the cases in the United States Court in and for the state of Idaho. This central division has two terms of the United States District Court, one commencing on the second Monday in March and the other on the second Monday in September of each year.

So that it affirmatively appears from the record that is on file in this court that the appeal in this case was not taken in open court; neither was it taken at the same term of court in which the decree was rendered.

This record further shows that there was no notice given or served by the appellants upon the other defendants and their refusal to join in this appal. Neither does the record show that there has been any severance. This being so, the Big Lost River Irrigation Company and the receiver of said company and the other defendants are not before this court for any purpose, either as appellants or as appellees. For this reason this court would have no jurisdiction to reverse this decree as it stands between Corey Bros. Construction Company and Union Portland Cement Company, and the Big Lost River Irrigation Company and the other defendants.

The Supreme Court of the United States In Re

Metropolitan Trust Co., 218 U. S. Report, page 320, speaking through Justice Hughes, said:

> "The decision of the Circuit Court of Appeals, in reversing the final decree and in directing the remand to the state court, was, of course, subject to the necessary limitation that it could apply only to the parties who had been brought before that court. It had no other purport. It is one of 'the ordinary rules respecting appeals' that 'all the parties to the record, who appear to have any interest in the order or ruling challenged, must be given an opportunity to be heard on such appeal.' Davis vs. Mercantile Trust Co., 152 U. S. 590, 593. See also Terry vs. Abraham, 93 U. S. 38; Wilson vs. Kiesel, 164 U. S. 248, 251. If a party has not had this opportunity he is not bound; as to him an essential element of appellate jurisdiction is lacking. Accordingly, when the decree was entered in the court below upon the mandate of the Circuit Court of Appeals, the Trust Company was expressly excepted from its operation."

Again this court has no right to hear or determine this case upon its merits, but should dismiss the appeal.

The testimony in this case is a joint decree as against the defendants. It orders a certain amount of money to be paid, and in the event that said money is not paid, that certain property in which all the de-

fendants claim some interest be sold out to satisfy said judgment, and it specially forecloses out whatever interest the Big Lost River Irrigation Company or the Continental and Commercial Trust and Savings Bank and Frank H. Jones, trustees, or the other defendants may have in and to said property.

This court in the case of Puget Sound Navigation Co. vs. Lavendar et al., 156 Fed., 361, speaking through Justice Gilbert, said:

> "This court is bound to inquire, first, as to its own jurisdiction, and, second, as to the jurisdiction of the court from which the record comes, and this even when the question is not raised by the parties to the action. M. C. & L. M. Ry. Co. vs. Swan, 111 U. S., 379."

Again this court in Copland et al vs. Waldron, 133 Fed., 217, speaking through Justice Hawley, said:

> "Appellants admit that the decree appealed from is joint, and that a joint decree should be appealed from by all, or severance made; that the fact that Pirie did not appear in the lower court furnishes no excuse for appellants leaving him out on the appeal; and that this court has the power to dismiss the appeal for want of his presence. But appellants claim that the contention of appellee that this court has no power to bring the omitted party in is not correct.
>
> We are of opinion that the facts of this

case bring it within the rule announced by the Supreme Court in Estis vs. Trabue, 128 U. S. 225, 229, 9 Sup. Ct. 58, 32 L. Ed. 437. After holding that a writ of error, in which the plaintiff and defendants were designated merely by the name of a firm containing the expression '& Co.,' was not sufficient to give the court jurisdiction, but, inasmuch as the record disclosed the names of the persons composing the firm, allowed the writ to be amended, under section 1005 of the Revised Statutes (U. S. Comp. St. 1901, p. 714), the court said:

"But there is another difficulty in the present case, which cannot be reached by an amendment in or by this court under section 1005. The judgment is distinctly one against the claimants, and C. F. Robinson and John W. Dillard, their sureties in their 'forthcoming bond,' jointly, for a definite sum of money. There is nothing distributive in the judgment, so that it can be regarded as containing a separate judgment against the claimants and another separate judgment against the sureties or as containing a judgment against the sureties, payable and enforceable only on a failure to recover the amount from the claimants; and execution is awarded against all of the parties jointly. * * * It is well settled that all the parties against whom a judgment of this kind is entered must join in a writ of error, if any one of them takes out such writ, or else there must be a proper summons and severance, in order to allow of the prosecution of the writ

> by any less than the whole number of the defendants against whom the judgment is entered. * * * Where there is a substantial defect in a writ of error, which this court cannot amend, it has no jurisdiction to try the case. * * * It will then, of its own motion, dismiss the case, without awaiting the action of a party."

This court in the case of Farmers' Loan & Trust Co. vs. Longworth, 76 Fed., Rep., 609, speaking through Circuit Court Justice Gilbert, said:

> "In a suit pending in the Circuit Court for the district of Washington, in which the Farmers' Loan & Trust Company, as complainant, sought to foreclose its mortgage against the Northern Pacific Railroad Company and other defendants, Henry Ives, Henry Rouse and H. C. Payne were appointed receivers of the railroad company, and thereafter Andrew F. Burleigh was substituted as sole receiver, in their stead. During said receivership the appellees in this case, Longworth, Bellinger, and Raskey and wife, obtained three several judgments against the Northern Pacific Railroad Company on liabilities incurred by the company before the foreclosure suit was commenced. On the 11th day of August, 1894, they intervened in the foreclosure suit, and united in a petition to the court for an order requiring the receiver to pay them their respective judgments. Upon this intervention the Farmers' Loan & Trust Company answered the petition,

setting forth its mortgage liens upon the property of the Northern Pacific Railroad Company; alleging that the judgments against the railroad company in favor of the petitioners were obtained upon liabilities that attached subsequently to the date of the mortgage liens, and that from and after August 1, 1893, the Northern Pacific Railroad Company had been insolvent, and that its property in the hands of the receiver was inadequate to pay the mortgage debt, and that the judgments were not entitled to priority over the mortgages. On the 18th of December, 1895, a final order was made by the court, directing Andrew F. Burleigh, as receiver, to pay the judgments. On January 20 the Farmers' Loan & Trust Company presented in the Circuit Court its petition for an appeal, and the appeal was allowed. Upon the same date it filed its three separate bonds to said Longworth, Bellinger, and Raskey and wife, for the costs and damages that might be awarded them on the appeal. Citation was issued, directed to Longworth, Raskey and wife, and Bellinger, and was served upon them on the 21st day of January, 1896. Neither the Northern Pacific Railroad Company, nor Andrew F. Burleigh, receiver, joined in the appeal; nor were they, or either of them, served with the citation. After the appeal was perfected in this court, and after a motion had been filed by the appellees to dismiss the same, the receiver, by his

attorney, entered in this court his appearance and consent to the appeal.

"In the case of Owings vs. McKincannon, 7 Pet. 399, a decree had been entered in the court below, directing the defendants to release to the complainant their right and title to certain real estate. A portion only of the defendants appealed. The court said:

"Upon principle, it would seem reasonable that the whole cause ought to be brought before the court, and that all the parties who are united in interest ought to unite in the appeal."

And referring to the act of 1803 (2 Stat. 244), providing for appeals in equity cases, the court said:

"The language of the act which gives the appeal appears to us to require that it should be prosecuted by the same parties who would have been necessary in a writ of error."

"In Masterson vs. Herndon, 10 Wall. 416, a bill of peace, and for the conveyance of a pretended title to a tract of land, was filed against one Maverick and one Herndon; and the decree was that complainant have and recover from the said Maverick and the said Herndon the said tract of land, and quited the complainant's title to the same. From this decree Herndon appealed, and, in his petition for appeal, alleged that his co-defendant refused to prosecute the appeal with him. In ordering the appeal dismissed in the Supreme Court, Mr. Justice Miller said:

"In chancery cases, all the parties against whom a joint decree is rendered must join in the appeal, or they will be dismissed. There are two reasons for this: (1) That the successful party may be at liberty to proceed in the enforcement of his judgment or decree against the parties who do not desire to have it reviewed; (2) that the appellate tribunal shall not be required to decide a second or third time the same question, on the same record. * * * We do not attach importance to the technical mode of proceeding called 'summons and severance.' We should have held this appeal good if it had appeared in any way by the record that Maverick had been notified in writing to appear, and that he had failed to appear, or, if appearing, had refused to join. But the mere allegation of his refusal, in the petition of ap- should be a written notice, and due serve, or the record should show his appearance and refusal, and that the court on that ground granted an appeal to the party who prayed for it, as to his own interest. Such a proceeding would remove the objections made to permitting one to appeal without joining the other; that is, it would enable the court below to execute its decree so far as it could be executed on the party who refused to join, and it would estop that party from bringing another appeal for the same matter. The latter point is one to which this court has always attached much importance, and it has strictly adhered to the rule

under which this case must be dismissed, and also to the general proposition that no decree can be appealed from which is not final, in the sense of disposing of the whole matter in controversy, so far as it has been possible to adhere to it without hazarding the substantial rights of parties interested."

"In Hardee vs. Wilson, 146 U. S. 179, 13 Sup. Ct. 39, Wilson, the complainant, filed his bill against Minor and his wife and Hardee, alleging that a conveyance of land made by the said Minor to himself as trustee for his wife, and a certain other deed of the same lands subsequently made to Hardee, were without consideration, and that they were made with the intention of putting said lands beyond reach of creditors, of whom the complainant was one. A decree was entered holding that the decree in favor of Minor and his wife was void, and that the deed to Hardee was security only for a certain debt due him. Hardee appealed, but his co-defendants did not join in the appeal, nor were they made parties thereto. It was held that Minor and his wife were necessary parties to the appeal, and the appeal was accordingly dismissed."

In the case of Davis vs. Mercantile Trust Co., 152 U. S., 590, the Supreme Court of the United States, speaking through Justice Brewer, on page 594, said:

"Neither does the appeal from the decree stand in any better condition. In a decree for

the foreclosure of a mortgage the two parties principally and primarily interested are the mortgagee and the mortgagor. No third party should be permitted to disturb such a decree unless and until both mortgagee and mortgagor are given an opportunity to be heard. The mortgagor may be unwilling that the decree should be set aside, notwithstanding irregularities in prior proceedings, for fear that on a subsequent hearing a larger sum may be decreed against him. It is not necessary in any given case to determine that his interests would or would not be promoted by the setting aside of the decree; it is enough that in that matter he has a direct interest, and because of this interest common justice requires that no change shall be made in the terms of that decree, nor shall it be set aside, without giving him a chance to be heard in its defense. Ordinarily it may be presumed that all the parties to the record are interested, and so it is often said that all such parties must be joined as appellants or appellees, plaintiffs in error or defendants in error; but it is unnecessary to rest this case upon the mere fact that the mortgagor in this case was a party to the record—the only defendant in the first instance. It was not only such a party, but is also one directly and vitally interested in the question whether the decree of foreclosure and sale shall stand, and yet it is not before us. The trustee is the only obligee named in the appeal bond, and while the citation on its face runs to all the

> parties to the record, it was not served on the mortgagor, the Kenawha & Ohio Railway Company, and that company has never been brought into this court, and never entered an appearance here. This is fatal to the appeal."

The last case quoted involved the foreclosure of a mortgage in which parties who claimed certain interests were interested, and is directly in point.

In the case of Loveless vs. Ransom, 107 Fed., 627, Circuit Judge Jenkins, speaking for the Seventh Circuit, said:

> "The rule is firmly established that, where a judgment or decree is joint, all the parties against whom it is rendered must join in the writ of error or appeal, unless there be summons and severance, or the equivalent. William vs. Bank, 11 Wheat. 414; Owings vs. Kincannon, 7 Pet. 399; Wilson vs. Insurance Co., 12 Pet. 140; Smyth vs. Strader, 12 How. 327; Masterson vs. Herndon, 10 Wall, 416; The protector, 11 Wall, 82; Hampton vs. Rouse, 13 Wall, 187; Simpson vs. Greeley, 20 Wall, 152; Feibelman vs. Packard, 108 U. S. 14; Estis vs. Trabue, 128 U. S. 225; Downing vs. McCartney, 131 U. S. xcviii; Mason vs. U. S. 136 U. S. 581; Dolan vs. Jennings, 139 U. S. 385; Hardee vs. Wilson, 146 U. S. 179; Ingelhart vs. Stansbury, 151 U. S. 68; Davis vs. Trust Co., 152 U. S. 590; Sipperly vs. Smith, 155 U. S. 86; Railway Co. vs. Evans, 175 U. S. 723; Fordyce vs. Trigg, 175 U. S. 723.

The Supreme Court has declared that the matter is jurisdictional, and may be raised at any time before final disposition of the appeal; and we have, in conformity with that ruling, so held in this court. Hook vs. Trust Co., 36 C. C. A. 645; Kidder vs. Safe Deposit Co. (C. C. A.) 105 Fed. 821.

Provident Life & Trust Co. of Philadelphia vs. Camden & T. Ry. Co. et al, 177 Fed. 854.

For the foregoing reasons the judgment of the lower court should be affirmed or this appeal dismissed.

Respectfully submitted,
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Attorney for Appellees.

NOTE—The case of Shields vs. Barrows is referred to in the printed record as 58 Fed. 129 and it should be 58 U. S. 129, Rec. 647, Judge Dietrich's opinion.